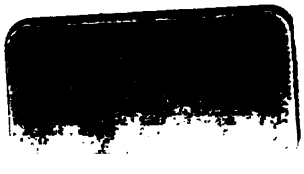

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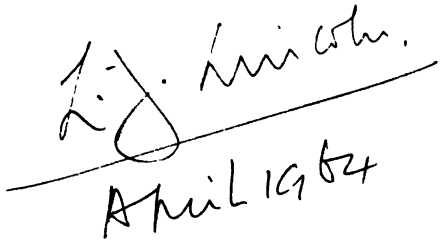

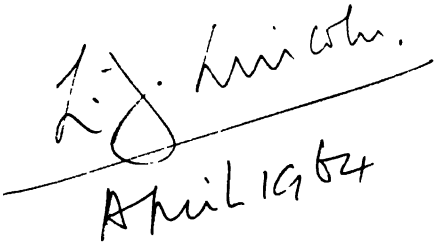

DECISIONS

OF THE

SUPREME COURT, VICE-ADMIRALTY COURT

AND

BANKRUPTCY COURT

OF

MAURITIUS,

DURING THE YEAR 1889

EDITED BY

ARTHUR THIBAUD,—BARRISTER-AT-LAW

MAURITIUS:

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1890

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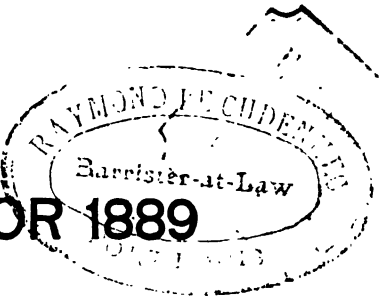

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JUDGMENTS OF THE SUPREME AND OTHER COURTS

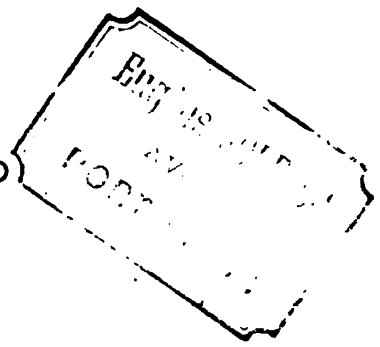
OF

MAURITIUS

EDITED BY

L. A. THIBAUD

BARRISTER-AT-LAW



1889

SUPREME COURT

—

APPEAL TO PRIVY COUNCIL — APPEALS FROM JUDGMENTS OF SUPREME COURTS SITTING IN ITS APPELLATE JURISDICTION — ORDER IN COUNCIL OF APRIL 1831—TERMS OF SAID ORDER IN COUNCIL.

The Supreme Court having confirmed a decision of the Bankruptcy Judge given on a petition for an order compelling a certain party to render an account of his management, as trustee, of a certain estate, the appellant moved to appeal to the Privy Council:

It was argued against the motion:

1o. *That no where in the Ordinance* 15 *of of* 1882 (*Bankruptcy Ordinance*) *is any mention made of an appeal to the Privy Council from the judgments of the Supreme Court, sitting in its appellate jurisdiction.*

2o. *That the judgment of the Supreme Court did not involve, in terms of the Order in Council of April* 1831, *directly or indirectly, a claim, demand or action, respecting property of the value of* £1000.

By the Court:

1o. *The Order in Council of* 1831, *allows an appeal against any final judgment of the Court of Appeal,* (*now, Supreme Court*). *The wording shows that cases from which an appeal was allowed include those in which the Supreme Court, sitting as a Court of Appeal, exercises its appellate jurisdiction.*

2o. *On the merits, the Court found that the action here was not one respecting property of the value of* £ 1000.

Motion for appeal refused.

—

COO VYTHILINGUM,—Appellant.

and

N. SOOPRAYEN,—Respondent.

—

Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

His Honor F. C. Williams.,—Puisne Judge.

and

His Honor J. Rouillard,—Puisne Judge.

—

H. Galéa,—Counsel for Appellant.
E. Laurent,—Attorney for the same.

Hon. W. Newton,—Counsel for Respondent.
H. Bertin,—Attorney for the same.

—

Record No. 24,535.

10*th. January* 1889.

On the 31st. October last, this Court confirmed a decision of the Judge in Bankruptcy given on a petition by one Coo Vythilingum the object of which was to obtain an order compelling one N. Sooprayen to give an account of his management as trustee of the Estate of Coo Vythilingum & Co.

The facts of the case are fully set forth in the judgment of the Supreme Court above referred to and it is needless again to relate them. Motion is now made to appeal to the Privy Council from the judgment of the Supreme Court. Several reasons were urged against the competency of the appeal. It was first argued that in as much as it would be impossible to say, in the present instance, to what amount the interest of the applicant would be affected by the judgment of the Supreme Court, no appeal to the Privy Council could be made under the Order in Council of 13th April 1831, which allows an appeal in cases only where the sum or matter at issue exceeds the amount or value of £ 1000.

The case of Quesnel frères vs. Lane Honkey & Co. (Piston's Reports 1864 P. 56) was referred to as in point. A careful perusal of this judgment has satisfied us that the circumstances of the present case are widely different from the facts in which the judges in the case of Quesnel frères had to form an opinion. The point then was whether an appeal to the Privy Council could be made from a judgment of the Supreme Court confirming an arrangement by a debtor with his creditors under the Bankruptcy Ordinance of 1853. The Supreme Court, in refusing leave to appeal to the Privy Council mainly founded its judgment on the fact that an arrangement under the control of the Court could not be termed, a "suit or action" as contemplated by the Order in Council of 13th April 1831. In the present instance the order of the Judge in Bankruptcy confirming the arrangement by Coo Vythilingum & Co. with their creditors is not challenged, but a question has been raised whether in the event of their being a surplus out of the assets of Bankruptcy, all the creditors having been satisfied, that surplus will be the property of the Bankrupts or one Sooprayen, who stood as security for the due performance of the agreement made by the Bankrupts with their creditors, and to whom all the assets of the Bankrupts have been transferred. This is really the matter at issue between the parties, and if the appellant satisfies the Court that it is above the value of £1000, his right to appeal is fully established. It was also urged on behalf of Respondent that no appeal to the Privy Council can be made from a judgment of the Supreme Court sitting in review of an order or judgment of the Judge in Bankruptcy. The learned counsel for Sooprayen founded his argument on the well known principle that no appeal lies from a Court to another unless express authority is given by law, and he urged that in as much as Article 60 of Ordinance 15 of 1882 merely allows an appeal to the Supreme Court from judgments of the Bankrupcy Court and that no where in the Ordinance above referred to, is any mention made of an appeal to the Privy

Council from the judgments of the Supreme Court sitting in its appellate jurisdiction, the right of appeal to the Privy Council in such cases could not be assumed.

The Court cannot adopt that view. The right of appeal to Her Majesty's Privy Council is regulated by the Order in Council of 1831, which allows such appeals against "any final judgment, sentence or decree of the Court of Appeal" now the Supreme Court. The very fact that the Order in Council of 1831 referred to the Court of Appeal in Mauritius indicates that it was fully contemplated that the cases from which an appeal to the Privy Council was allowed would include those in which the Supreme Court sitting at a Court of Appeal had exercised its appellate jurisdiction.

The real point before the Court is therefore whether the judgment of the Supreme Court involves, in terms of the Order in Council of 13th April 1831, directly or indirectly, a claim, demand or action respecting property of the value of £1000. This the appellant has undertaken to allow. According to his calculation, the matter at issue between the parties amounts to about Rs. 19,000 He proceeds in the following manner. He assumes the liabilities of the Bankrupts to amount, as per balance sheet filed in the Bankruptcy Court, to about Rs. 50,000 on which the Respondent has undertaken to pay 50 o/o (an undertaking on which no dispute has arisen) deducting Rs. 25,000 (half of the Bankrupts liabilities) from Rs. 44,000 which is the rough amount of the assets as per balance sheet, the sum of Rs. 19,000 is obtained, as before stated.

These figures, however, have to be corrected as follows: Leaving entirely aside the items disputed by appellant, the Court finds in an affidavit of Respondent dated 5th December 1888, that the following sums paid by Respondent as preferential claims which did not appear in the balance sheet, have been left out of the calculations of the learned counsel for appellants:

Costs of the Accountant in Bankruptcy	Rs. 2,251.49
Privileged costs due to creditors as per bills taxed	848.60

The payment of these sums is not contested by appellant.

The following sums paid for rent must also be added.

For rent to Widow Dauban...	900.00
Do. to Delange	900.00
Do. to Coutanceau ...	260.00

These payments last mentioned are admitted by appellants in an affidavit dated the seventh December, subject to the deduction of the sum of Rs. 576.75 received from sub tenants.

The payments made by Respondent about which there there cannot be any dispute are therefore as follows:

Half of liabilities as per balance sheet total amount Rs. 49,794.26 Rs. 24,897.18

Paid to Accountant in Bankruptcy...	2,251.49
Privileged costs to creditors	848.60
Paid for rent.. Rs. 2,060.00	
Less 576.75	
	1,483.25
Total... ...	Rs. 24,480.47

The assets of petitioner are set down in the balance sheet at Rs. 43,984.45 but this figure is also manifestly incorrect. Leaving out of consideration all disputed items, we find that the balance sheet includes as assets a sum of Rs. 2000 due by one Doorasamy. In his examination before the Judge in Bankruptcy the Respondent admitted that Doorasamy was insolvent and had no means of paying his debt.

There are also debtors whom the bankrupt calls "bad debtors" for Rs. 1,133.60 thir simply means that there are claims for Rs. 1,133.60 which will never be paid and ought not to be taken into account. Deducting these two items of Rs. 2,000 and Rs. 1,133.60= Rs. 3,133.60 from Rs. 43,984.43, we find that the assets as a maximum, amount to Rs. 40,850.83. The difference betwe en Rs. 29,480.47 and Rs. 40,850.83 is Rs. 11,370.36 an amount as to which no appeal can lie on account of the high rate of exchange between this Colony and England.

The appellant however now includes amongst his assets, property which, as he alleges, he owns in India and, in an affidavit which he has filed he asserts that in an inventory drawn up by "competent authority," his property has been valued at Rs. 40,000. The inventory is not produced and there are no means of testing its accuracy nor do we know who is the competent authority referred to. On the other hand, the appellant himself, when examined before the Judge in Bankruptcy, stated that he had recently returned from India and that his property there was not worth more than eight thousand rupees, b ing besides mortgaged to the full amount of its value. This is at least a positive and definite statement. The Court must be guided by it and not by the alleged inventory about which nothing is known.

The Court will therefore leave entirely out of consideration the Indian Assets, which, so far as it has been able to ascertain, have no value. The amount of the matter at issue between the parties must be determined by the assets and liabilities in Mauritius, and as to these the opinion of the Court has been already expressed.

Appeal refused with costs.

SUPREME COURT

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RIVERS—STREAMS—ARTICLES 641, 644, 645 CODE CIVIL—ORDINANCE 35 OF 63—SHARES OF WATER SOLD—BEDS OF RIVERS PUBLIC PROPERTY — EASEMENT OR SERVITUDE — SHARES OF WATER CANNOT BE SOLD—HOMOLOGATION OF DEED OF SALE REFUSED.

A, a riverain, sold to B, an other riverain, thirteen shares of waters of a river, bordering on their respective estates, which shares had been alloted to A by a decision of the Land Court.

The purchaser having asked for the homologation of the arrangement, the Court considered :

1o. *That under Ordinance No. 35 of 1863 all rivers and streams in Mauritius are "du domaine public"; and that the Ordinance does not repeal Articles 641, 644, 645 of the Code Civil, but is merely declaratory and, in a measure, explanatory of these articles.*

2o. *That Art. I of the Ordinance was intended to place the bed of the river or stream under the control of the central authority, and Article 4, to charge the river bed with the servitude of supplying borderers with waters for the purposes specified in the Ordinance.*

3o. *That the bed of the river, as well as the waters, being public property, the riparian owners have no right to dispose either of the waters or of the bed, or, in fact, to dissever permanently the river from the soil to which it had been assigned.*

4o. *That so far as irrigation is concerned, the object of Ordinance No. 35 of 1863, was to legalize a natural servitude, and that servitudes derived from the situation of places are regarded as appertaining to the lands for whose benefit they exist, so that they cannot be alienated from the*

land, and that the right to exercise them passes with the land to every owner and possessor of the dominant tenement.

One of the Judges remarked:

(a) *That Article 644 stands in that title of the Code, which treats of "servitudes" under the chapter headed "Des servitudes qui dérivent de la situation des lieux."*

(b) *That even if the riverains had the right to sell, their right being a joint, not an individual, right, all the riverains interested should perhaps join in, or, at least, assent to the application to the Court.*

The application was refused.

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Ex Parte

A. COLIN,—Applicant.

—

Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

L. CHASTELLIER,—Counsel for Applicant.
A. COLIN,—Attorney for himself.

The Honble L. ROUILLARD,—Substitute Procureur General,—Ministère Public.

21*st. January* 1889

JUDGMENT.

Delivered by Mr. JUSTICE WILLIAMS.

The very important question at issue in this application is whether a "riverain" or proprietor of land bordering a river, to whom a share of the water of the river has been assigned by the Land Court of the Colony under Ordinance No. 35 of 1863, can dispose absolutely of that share of water to a neighbouring riverain. The Court is asked to homologate such an arrangement in the interest of Mr. Anthony Colin, owner of *Pierrefonds* Estate, who wishes to acquire by purchase the thirteen shares of the water of the river Cogliano assigned by the Land Court for purposes of irrigation, in 1872, to the proprietors of *Solférino* Estate, now Messrs. G. de Coriolis and Brouard. The principal Articles of the Code Civil which regulate the rights of river borderers to the water of rivers are Articles 641, 644 and 645 C.C., of which Article 644 runs: "Celui dont "la propriété borde une eau courante autre "que celle qui est déclarée dépendance du "domaine public par l'Article 538... peut "s'en servir à son passage pour l'irrigation "de ses propriétés."

It has been truly said that such running waters as are within the provisions of Article 538 of the Code to wit: navigable rivers, or rivers used for floating material from place to place, do not exist in Mauritius. It may, therefore, be taken, prima facie, that the rights accorded to river borderers by Article 644 of the Civil Code apply to all the rivers of this Island, unless it is otherwise provided by local legislation.

Local legislation upon the subject is embodied in Ordinance No. 35 of 1863, which was to amend and consolidate the law as to rivers, streams and canals, and of which the opening section declares all rivers and streams here to be public property, subject to the provisions of the Ordinance. Section 4 provides that, still subject to the other provisions of the Ordinance, "les propriétaires de terrains bornés ou traversés par "une rivière ou un ruisseau auront droit "à la jouissance de l'eau à l'exclusion de "tous autres" and the Ordinance provides for the apportionment of water upon application by the Land Court, to the proprietors of the lands, of any district, after due notice whether all these proprietors are represented before the Land Court at the time of the apportionment or not.

In the local case of Despeissis vs. Carcenac (Piston Vol. 7 P. 80) it was laid down by

this Court that Ordinance No. 35 of 1863 is not to be regarded as in any sense repealing the Articles of the Code Civil relating to its subject, but that the local law is merely declaratory, and it may perhaps be added, in some measure, explanatory, of these Articles. I am quite disposed to follow that ruling; but the serious question for our decision in the present case is as to the sense in which the Local Ordinance is explanatory of Article 644 of the Code—whether, in fact the spirit of the Local Ordinance is more consistent with the sense in which Article 644 is regarded by Demolombe, Troplong and Laurent who consider that such rivers as the one under notice are the absolute private property of their borderers, or with the views of Proudhon, Merlin and other commentators, who hold that the use (jouissance) of the water is no more than a species of easement enjoyed by the riverains, the river bed being charged with the servitude of furnishing them with water.

When I consider the immense importance to this small colony of its natural water supply, and the comparatively limited nature of that supply, I have no difficulty in finding a strong sense of this importance and of this limitation reflected in the provisions of the Local Ordinance, and affording a justification and a "motif" for its stringent limitations and for the machinery which it affords for the due apportionment of water amongst river borderers for purposes of irrigation. And when in Clause I, the Ordinance declares all streams to be "du domaine public" and, in clause 4, all borderers to have the "droit à la jouissance de l'eau à "l'exclusion de tous autres," I cannot avoid the conclusion, reading the two declarations together, that Article I is intended to operate as placing the bed of the river or stream under the control of the central authority, and Article 4 to charge that river bed with the servitude of supplying borderers with water for the purposes specified.

"The Mauritius Legislature, said the learned counsel for Mr. Colin, in his argument, has adopted the jurisprudence of Proudhon." But the jurisprudence of Proudhon appears unmistakably in favour of that view of the Articles of the Code which is my view of Article 644, read in conjunction with Clause 4 of the Local Ordinance. Going back to the origin of things (Traité du domaine public Vol.3 P.291) Proudhon says that our ancestors "n'ont évidemment pas eu l'absurde pensée "de morceler les rivières comme ils ont fait "de leurs champs, à l'effet de placer dans le "domaine de propriété exclusive un courant "d'eau qui échappait incessamment à leur "main mise ou à leur puissance. Il est "sensible qu'il ne leur est pas venu "l'idée de rendre les riverains propriétaires "et maîtres exclusifs d'une chose dont l'usage "était nécessaire à tous." Coming more particularly to the rights of riverains as defined in the Code, he says (P. 323) "le "droit d'un propriétaire riverain est un droit "de servitude légale imposé sur le fonds du "domaine public pour l'avantage des pro-"priétés adjacentes à la rivière puisqu'il est "individuellement attaché à celles-ci." And does he, to continue and to approach more nearly the subject of the application before us, consider that the water thus indivisibly attached to bordering proprietors can be the subject of an absolute sale on the part of proprietors?

"Il est très certain, he says (P. 307) que "les propriétaires riverains ne jouissent pas "du lit même de la rivière dont le cours est "continuel et si nous voyons qu'ils ont le "droit de pêche, de cours d'eau et d'irriga-"tion, nous voyons aussi que sous aucun "rapport ils *n'ont celui de disposer ni de la "rivière* ni de son lit, ni même de les admi-"nistrer: donc ils n'en ont pas la propriété."

Now, as was observed in the case of Rougé vs. Feillafé (Piston 1871 P. 112) the right to sell or to assign is the correlative of the right of property in a river and if, according to the jurisprudence of Proudhon which I agree with the learned counsel for Mr.

Colin in considering as adopted by the framers of our Ordinance No. 35 of 1863, I do not find that "riverains" have a property in their river, but that they enjoy its waters as a servitude, I must also hold with Prudhon that they have no right to dispose either of the waters or of their bed, or in fact to dissever permanently the river from the soil to which it has been assigned. So far as irrigation is concerned, the object of Ordinanee No. 35 of 1863 is, in my view, to legalize a natural servitude; and to quote the language of Addison on Torts (4th Edn. P. 63) "Servitudes derived from the situa- "tion of places are regarded as appartenant "to the lands for whose benefit they exist, "so that they cannot he alienated from the "land, and cannot be transferred from one "person to another as benefits and privileges "in gross. Being annexed to the land "itself, the right to exercise them passes "with the land to every owner and possessor "of the dominant tenement."

The object of the application before us is clearly to alienate, and to alienate permanently, the portion of water assigned by the Land Court to *Solférino*, on one side of river Cogliano, and to attach it to *Pierrefonds*, on the other side, and I think that such a sale involving such a permanent severance of the land from its assigned share of water, is contrary to the spirit of the Ordinance, and to that of Article 644, according to the interpretation of it which commends itself to my judgment. It may be true that, as things stand at present between the proprietors of these two properties, no loss would be felt by the one, while there would be an increase of facilities for cultivation to the other as the result of the proposed sale and purchase. But the assignment of water to riverains under the Ordinance, I regard as an assignment to them *quiâ* "riverains" or proprietors and not to them *quiâ* individuals; and we have to remember that in time to come and under other and future proprietorship, the existing conditions might be reversed and a property standing in need of it might, if we authorized the proposed arrangement, find itself permanently deprived of its assigned share of water. Against such a possible condition of affairs, I believe it was the object of the Local Ordinance to provide guarantees, rather than to afford any facility for its occurrence, and according to this view, were we to decide this application upon a different estimate of the rights of property possessed by the parties before us, we should scarcely be following the direction of Article 645 of the Code which, in the matter of disputed water rights, directs the Court in giving judgment to take into consideration agricultural interests as well as the respect due to property.

For these reasons, we should, in my view, decline to homologate the arrangement as prayed for.

JUDGMENT

Delivered by Mr. JUSTICE MURE.

While I concur in the result, to which my learned brother has come, the importance of the question submittted to the Court induces me to state my own views, and the grounds upon which I have come to the same conclusion.

On the 1st. October 1888, by a deed under private signature between Albert Brouard and Gustave de Coriolis proprietors of *Solférino* in Plaines Wilhems, on the one hand, and, on the other hand, the applicant Antony Colin, proprietor of *Pierrefonds*, in the district of Black River, it was agreed that thirteen shares of water of the river Cogliano assigned to *Solférino* under the division of that River, which is also called the Rivière du Rempart, by a decree of the land Court dated tenth of December 1872, should be made over and conveyed by the former parties, the proprietors of *Solférino*, to the latter, the proprietor of *Pierrefonds*, and to his heirs and assigns. The ground-

expressed in the deed is that the proprietors of *Solférino* have taken into consideration the great expense which would be occasioned by making the works necessary to enable the proprietors to enjoy their right of water. The payment of the price was made conditional upon Mr. Colin's obtaining the homologation of the arrangement from the Supreme Court, and he bound himself to apply for that at once. Accordingly the applicant, Mr. Colin, made an affidavit on the eighteenth of October 1888 narrating the facts and alleging that the owners of *Solférino* do not make any use of their thirteen shares of the river in question while he at *Pierrefonds* could easily take these thirteen shares by his dike. He then applied to the Court to homologate the agreement between himself and the proprietors of *Solférino* and to authorise him to take the thirteen shares by an aperture in a dyke on *Pierrefonds*. The application was not intimated to, and was neither assented to nor opposed by any of the riverains, but the Substitute Procureur General, gave in a long argument, conclusions which were not favourable to the applicant. The question is, ought the Court to homologate the contract of sale contained in the private deed above mentioned ?

By a local Ordinance, No. 35 of 1868, the object of which is to amend and consolidate the laws as to rivers, streams and canals in the Colony, and by the first and leading section thereof, all rivers and streams are declared and enacted to be public property (du domaine public). The Supreme Court of this Colony have been called upon on two occasions to consider the interpretation of this Ordinance. In the case of Despeissis versus Carcenac, (Piston's Report 1867 P. 80) the opinion was expressed that the provisions of this Ordinance have not modified or abrogated Articles 641, 644 and 645 of the Civil Code, and that it is nothing more than a legislative interpretation of the principles laid down in these articles, the application of which had given rise in France to much indecision and controversy.

In the second case of Rougé vs. Feillafé, Reports 1871 P.112 this opinion was referred to and approved of. We have then to consider the important question now before us, not merely by the provisions of our own Ordinance, but also by the light of the law of France as applied to the question and as modified and affected by the provisions of the Ordinance.

By section 538 of the Civil Code, certain subjects among which are "les fleuves et rivières navigables ou flottables" are considered as dependencies of the public domain. It is universally admitted by all French writers that subjects included within the public domain are destined to the use of all and by the mere fact of that destination belong in property to no one, and the state itself only exercise a certain control over them in the interest of the Public Rivers then which are either navigable, or down which rafts of wood can float are held by French Law to have two characteristics, one that they are destined to public use, the other that so long as that destination exists, all idea of private property is out of the question.

It is also universally admitted that the subjects contained under this article are inaliénable and that the law of prescription cannot apply to them. The law of France is perfectly distinct upon those points and no one would think of calling them in question.

But it is far otherwise with those rivers and streams which are not susceptible of navigation or of bearing rafts of wood. In regard to the legal position of these subjects no direct legislation exists in the Code, and the law applicable to that kind of property has to be deduced from various Articles of the Code which indirectly deal with collateral points. The first theory was to continue the law which prevailed before the Revolution,

according to which the property of such streams belonged to the borderers. This was the doctrine of the feudal law which pervaded the whole system of social life while it prevailed. Pothier writing at this time says: " à l'égard des rivières non navigables, elles " appartiennent aux différents particuliers " qui sont fondés en titre ou en possession, " pour s'en dire propriétaires dans l'étendue " portée par leurs titres ou leurs possessions; " celles qui n'appartiennent pas à des parti- " culiers propriétaires, appartiennent aux " seigneurs hauts justiciers, dans le territoire " desquels elles coulent." (Droit de Propriété No. 53.) Many eminent names after the abolition of the feudal law and the creation of the Code have supported this theory. But the second theory that non navigable rivers belong to the state was supported also by great authority, and was the view adopted by several leading members of the constituant assembly, such as Cambacéres. It was maintained that on the abolition of the feudal rights the borderers resumed at once their lost rights in these streams. But against this, we have the great authority of Troplong who, in his treatise on prescription, Vol. 1, P. 217 and 218 says that:

" L'état successeur de la Seigneurie féo- " dale dans la haute justice a recouvré de " plein droit avec celle-ci le domaine " des petites rivières et l'héritage de tout ce " qui s'y rattache pendant qu'elle était " morcellée que des lors le droit romain sur " la propriété de ces rivières fut en quelque " sorte ressuscité, et qu'on peut dire avec " lui: Flumina autem omnia publica sunt."

The third system gave the property of the bed of the streams to the borderers, but the water itself belonged to no one. For this view much may be said intrinsically. Running water escapes the effort to take possession of it, but the bed of the stream remains permanently attached to the adjacent soil of the borderer's property. If his estate lay on both sides of the stream, it was most natural that the land over which the stream ran should be held to be his property, and if the respective banks belonged to different proprietors, their respective rights went up to the middle of the stream. This is the law which prevails in Great Britain; but in France this theory is founded on the 361st. Article of the Code which gives to the borderers of non navigable rivers the property of the Islands, Isles and alluvion (atterrissements) which are formed in the bed of such rivers. This interpretation is, however, much controverted and is completely answered by that clause of the Code, which gives the bed of such rivers, if they change from the old bed to a new one, to those proprietors who have lost their land by the stream occupying a new bed (See Article 563, Civil Code.) Accordingly the fourth or latest system of law has established that in rivers not capable of navigation, neither the water nor the bed of the river belong in property to the borderers, but the use is common to all and they belong to that category of rights which were called in Rome Res nullius, or, I would rather say, res omnium, or as the French express it " choses communes." At an early date of the existence of the Code, Merlin lent the weight of his great authority to this system. He says: " Des- " tinées à l'usage commun de tous, par une " sorte de consécration publique, les petites " rivières n'appartiennent proprement à per- " sonne et ne dépendent que de la puissance " sauveraine, sauf l'usage particulier que les " propriétaires ont le droit d'en faire pour " leur besoin et leur avantage" (Merlin— Questions de droit. Verbo. Cours d'eau § I P. 728.)

It is clear that running water must naturally be ranked with the air, the light, the sea and natural objects of a like nature. If the possession of such things is reduced to a momentary use thereof, and if it is impossible to obtain an exclusive and permanent ownership of them, how can any one claim an exclusive right of property in

them ? "Evidemment, says Dariel in his "first Volume P. 14 ; l'air, la mer, l'eau de- "vaient rester entre les hommes dans "une communauté négative, qui permet à "chacun d'en user sous la condition de ne "pas gêner l'usage réciproque que les "autres sont appelés à en tirer aussi." This system was adopted by the learned author Proudhon, as has been amply shown by my learned brother, and became the acknowledged doctrine of the Courts in France. It is not necessary to refer to more than one case reported in S. V. 1846-1-433, in which the Court of Cassation held that the right of use of a running water given to the borderers by Article 644 of the Civil Code excluded entirely a right of property in the stream of water. That decision furtherformally decided that the rivers which were not navigable or floatable did not belong to the proprietors of the banks (propriétaires riverains d'après les dispositions ci-dessus) but they belong to a category of objects which, in terms of Article 714 Code Civil belong to no one and of which the use is common to all and the enjoyment of which is regulated by Police Laws. This and similar decisions were not received without question in France, and the report of that very decision contains a learned note by the Editor maintaining that the small rivers are not part of the domaine public but belong in property to the riverains. About this time too was published an able treatise "de la propriété des eaux courantes" by Championnerie, which maintained the rights of the Riverains with great ability.

Shortly before this, Proudhon had published his work on the domaine public, in which the doctrine of the Court of Cassation was maintained with great power, and in France that system and that law may be said to have remained masters of the field. It was in these circumstances that our local Ordinance 35 of 1863 was passed, which has been held not to abrogate any of the Articles of the Civil Code, but was meant to remove doubt and difficulty in the interpretation of these articles. I will add that it supplemented also the law of the Code for it laid down as a general and leading principle of the Ordinance that the whole waters of this Colony form a part of the domaine public or, in the words of the English translation of the Ordinance, they are public property. If these words of the Ordinance be taken by themselves and without reference to any other clause therein, having regard to what is said as to the meaning of domaine public in France, it follows as a matter of course that the whole streams of water of this Colony are inalienable and imprescriptible. In these respects the Colonial waters are placed in a position apart and destined to the general use of all, and withdrawn from exclusive appropriation by any one. The difference from Crown land is very notable, because a trespasser, even by a public occupation of that land as owner during the years of prescription, can acquire a right against the crown.

But then this first section of the Ordinance declares the Colonial Rivers to be public property with the important interpolated words "except as herein provided" and the clause ends with the words "subject to the provisions of this Ordinance." We have, therefore, to consider whether any and what kind of right is conferred by it on the Borderers. The second section authorizes any person whatever to draw water from any river for the use of himself, his family and animals possessed by him. In like manner, by the third section, portions of the water of any river may be taken for supplying towns, villages, public buildings or establishments and it is significantly added "due regard being had to existing and future interests." The Ordinance thus provides in these two sections for the wants of the general public, and places in a strong light the importance of providing for the necessities of a population living in a tropical climate, to whom constant access to water is an invaluable right, and not only is the present state of matters to be considered, but the future

interests of each locality is to be kept in view. Then follow Articles 4, 5 and 6, which to my mind both specify and limit the rights of borderers on the water of the rivers which traverse their estates.

The first of these sections (the fourth,) enacts that these borderers shall have right to the use (jouissance) of the water of the rivers to the exclusion of all others in the manner thereafter provided; the second of these declares that the rights of the proprietors shall be equal in character and principle, and the last of these clauses authorises the Borderers to use the water of the rivers for the irrigation of their land conformably to the provisions of the Ordinance.

This limitative words, the use of the water in the manner hereinafter provided, and the irrigation of the land "conformably to the provisions of this Ordinance" refer to the manner in which the rights of parties *inter se* are regulated and the mode in which the Land Court was to proceed in apportioning the whole volume of water between the estates according to the size of each. But the right of the riverains are neither extended or affected by these subsequent provisions. Meanwhile, it is right to compare these clauses with the 644th. Article of the Civil Code which confers similar rights on those whose property borders on a running water. Now the right of use of the water and the right of irrigation are given by the 644th Article of the Code, and the enactments of the clauses of our Ordinance are the same and give similar rights. While it is true that there has been great diversity of opinion in France upon the extent of right given to the Borderers, some maintaining that it was a right of property and others that they had only a servitude of use of the water, there can be no doubt that the jurisprudence that has prevailed excludes a right of property altogether in the Borderers, and gives them merely a legal servitude of the water.

This, undoubtedly, is a more reasonable interpretation to put on this Article than to hold that it declares a right of property. The 644th. Article stands on that title of the Code, which treats of servitudes, and under that chapter which is headed "des servitudes qui dérivent de la situation des lieux." This, of course, is not in itself conclusive, but one looks in vain in the Articles of this Chapter for an indication of a right of property being conferred. If that be so, and having regard to the course of thought and the progress of jurisprudence on this subject of which a short sketch has been given in the first part of this judgment, it is impossible to hold that the 4th., 5th. and 6th. sections of our local Ordinance give to river side proprietors any higher rights than those that are specified; and I am inclined to agree with that side of the argument which deduces from the specified and limited rights conferred, that the higher right of property is excluded.

The case of Rougé versus Feillafé has an important bearing on this question. The proprietor of an Estate before the water was divided was held not to be entitled to sell the estate reserving to himself the exclusive right and use of the whole water for that part of his estate which he had not sold. But the Court laid down two principles, the first that all rivers and streams in Mauritius are public property, and the second that the vendor whilst selling a portion of his property had no right to reserve to himself the property of the share of the water which might be afterwards attributed to the land sold. It seems to follow from that decision that the water of a river running through or past an estate is part and pertinent of the land itself and cannot be separated or disjoined from it. The mere fact that the water has been apportioned does not make any difference in the right, for the apportionement is as consistent with a right of servitude as it is with a right of property. It is further clear that if we were

to interpret the 4th and 6th clauses of our Local Ordinance along with those clauses which enable the Land Court to apportion the water among the properties as giving a right of property in the water, that would be contradictory of and in opposition to the enactment of the first clause that rivers are " du domaine public." I mean that it would require an express enactment that these rivers were the property of the riverains in order to derogate from the law created by the first section of the Ordinance. Even Laurent who is the strongest modern author maintaining that rivers are the property of the riverains, when discussing this very subject says (Vol. 7 Par. 254) " Nous avons " dit ailleurs que le Code Civil considère les " fleuves et rivières navigables comme une " dépendance du domaine public. Il suit de " là que les riverains n'ont aucun droit, étant " tant destinés à l'usage de tous ces cours " d'eau ne sont pas susceptibles d'une propriété " privée." The law of the 538 clause of the Civil Code has been made the law of all the colonial rivers and streams by the first Article of our Ordinance, and that the law must be applied to them.

The doctrine that the 4th, 5th and 6th sections of the Ordinance specify and limit the rights of the riverains and that the right of property is excluded therefrom is made clear by a consideration of the difference of right conferred on the riverains, of canals. There is a part of this Ordinance, which contains a Code of regulations for the canals of the Colony. It is well known that the water of these canals is taken from our rivers at certain points to supply certain districts or estates with water. It may seem strange that water derived from rivers which are public property should, by transference to a canal, become private property. But the first section of the canal Code, the 31st clause of the Ordinance, enacts that the canals in Mauritius shall be held to be the property of the individuals etc., having right thereto. This is a contrast to the first clause in the Rivers Code that they are public property. Further as it is clear that the authors of the Ordinance knew well how to express themselves, when they wanted to give a right of property, it may be deduced from the fact that there are no similar words in conferring the rights of the riverains of rivers, that there was no intention to confer a right of property on them. The Court of Cassation in the case quoted and in many others, deduced the conclusion that the riverains were excluded from a right of property by the mere specification of the rights given, but the comparison of the different rights given to canal and river riverains in our Local Ordinance affords a stronger ground of judgment.

We have also the authority of Dalloz distinctly given against such an application as the present. In treating of the question of the property of non navigable rivers under the word " Eaux, No. 215, he says : " Dès que les eaux sont *res nullius*, le droit " de les utiliser ne peut être l'objet d'une " cession, d'une *vente proprement dite*, de la " part d'un riverain au profit d'un autre " riverain ; car on ne peut céder une chose " dont on n'est pas et même dont on ne sera " jamais propriétaire." It is true that by the 221st section of the same treatise, Dalloz refers to a convention whereby one riverain might consent for a price not to irrigate his own lands so as to leave to his neighbour the whole volume of the water, but this he does not to approve of it, but merely to remark that the right of the riverains being purely facultative, the faculty of making use of the water for irrigation might be paralysed by the effect of such a convention. It is also clearly apparent that he refers in that section to a temporary arrangement only. Before concluding this judgment and merely by way of illustration of the applicant's position it is perhaps right to consider whether if the other theory be correct, the applicant would be entitled to succeed so as to obtain the homologation of the deed under considera-

tion. I refer to that theory which gives the riverains a right of private property in the river which borders their estates. The strongest and most able supporter of this theory is Mr. Laurent in his recent great work, the "Principes du droit civil". In his sixth volume, Paragraphs 16 and 17, he lays it down categorically that rivers not navigable or floatable belong to the riverains, and he quotes Championnerie with approval. In the 17th Section he says: "Les cours "d'eau navigables appartiennent à l'état, "les cours d'eau non navigables ne lui ap- "partiennent pas. A qui appartiennent-ils? "N'appartenant pas à l'état, ils doivent "appartenir aux particuliers puisque tout "bien qui n'est pas une dépendance du "domaine public est par cela même pro- "priété privée." Nothing could be more distinct than this assertion, and nothing could at first sight appear more certain than that such rivers were the property of individuals. But when the theory of Laurent is developed, a different result is reached. At paragraph 19 he says, this right of property is of a particular kind. "Il est certain que "ce n'est pas la propriété définie par l'Ar- "ticle 544, les riverains n'ont pas le droit "de disposer du cours d'eau de la manière "la plus absolue. L'Article 645 le dit."

He goes on to say that proprietors do not stop because of the interest of other proprietors, and he adds "celui qui use de son droit "ne fait de tort à personne." Le riverain "n'en peut dire autant. Pourquoi? Parce "que son droit est une co-propriété et non "une propriété exclusive." He goes on to give a list of the rights which this property of a special nature gives them. "La loi "leur donne tous les droits qui sont com- "patibles avec le droit égal de leurs "co-propriétaires, chaque riverain a le droit "exclusif de pêche chaque riverain peut se "servir des eaux à tous les usages auquels "la nature ou l'industrie les destine, ces "droits forment une propriété quelque "limitée qu'elle soit." Observe that he does not mention the right of sale or of absolute disposal as one of the rights of this limited property. On the contrary he actually says the right of property is not one as wide as that given by Article 544 which defines property to be the right of enjoying and of disposing of any subject or thing and he actually excludes this special right of property in small rivers from that article. Further supposing that he does not exclude a right of disposal or sale from the co-riverains, it is perfectly clear that having laid down the principle that their right was a joint right of property and not an exclusive individual right, it would require the whole riverains interested in the river to be parties to the agreement, and to join in or at least assent to the application to the Court. This was one of the arguments of the learned and able counsel for the applicant that the right of property in the colonial rivers and streams belonged to the riverains as a class. But if that be so, there must be some other convention than a mere bargain between the vendor and vendee, and there must be at least a union among all the commoners (communistes) to constitute a valid application to the Court. Of course these remarks are not part of my judicial opinions but are given merely to illustrate the applicant's position on the theory most favourable to him.

I concur entirely in the views of my learned brother on the non expediency of the arrangement made in the deed between the parties in the case of future possible contingencies, and I need not enlarge on that part of the subject which has been so well done by him. I have only further to add that this application must in the circumstances be refused.

SUPREME COURT

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DAMAGES—SHIP SENT INTO QUARANTINE—NO SMALL POX ON BOARD—ORDINANCE 8 OF 1874, ARTICLES 43 AND 48—POWERS OF BOARD—LIABILITY OF THE GOVERNMENT—IMPRUDENCE—DAMAGES ALLOWED.

Plaintiff sued the General Board of Health in damages, for having ordered his ship which had been admitted to pratique since ten days, to proceed from Port Louis harbour to the quarantine ground and there to remain for seven days more, under the imaginary motive that cases of small-pox had existed on board during the voyage.

Plaintiff further claimed damages on account of a collision between his ship and another in the harbour, while she was swinging to proceed to the said quarantine.

By the Court:

Seems that the action should perhaps have been directed against the Government, and not against the General Board, whose resolutions must be approved by the Executive before being carried out.

On the merits, the Court held:

1o. *That the powers of the Board under Article 43 of Ordinance 8 of 1874, were only permissive and not imperative, and cannot protect the Board from the consequences of the exercise of such powers, unless circumstances are serious enough to warrant their action in the interest of the public.*

2o. *That Article 48 of the Ordinance must be read conjointly with Article 43, and that if small-pox had really existed on the ship, the General Board would have been entitled to act as they did.*

3o. *That, as a fact, as the Board might easily have ascertained, no small-pox had existed on board.*

4o. *That the Board had acted imprudently, and that neither their good faith nor the approval of the Executive was a bar to the action.*

5o. *That the collision was the result of Plaintiff's fault.*

Plaintiff was allowed Rs. 3,822 damages and two thirds of his costs.

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SCHUMAKER,—Plaintiff.

and

THE GENERAL BOARD OF HEALTH,—Defendant.

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Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

His Honor A. MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

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L. CHASTELLIER and W. NEWTON,—Counsel for Plaintiff.

RITTER,—Attorney for the same.

Hon. L. ROUILLARD, Substitute Procureur General,—Appears for Defendant.

J. GUIBERT "Crown Attorney",—Attorney for the same.

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Record No. 24,157.

1*st. February* 1889.

The plaintiff who is the Master of the British Screw Steamer *Taïf*, and as such representing the owners of the steamer, has entered an action in damages against the General Board of Health of this Colony under the following circumstances. The *Taïf* which is of a gross tonnage of 1,284 tons, and of a registered tonnage of 878 tons, arrived from India in the beginning of March 1887 and was admitted to pratique on the 7th of that

month and taken to her moorings in the harbour of Port Louis. She landed her passengers, discharged her cargo and she was taking in cargo for Bombay, when on the 17th of the same month, she was suddenly ordered into quarantine, and in the morning of the 18th she proceeded from her moorings in the harbour to the quarantine ground, outside the Bell Buoy, where she was detained until the 24th March, when she was allowed to return into the harbour and to complete taking in her cargo. The Plaintif now says that the *Taïf* was illegally detained and prevented from proceeding on her voyage during 8 days, and that the owners have suffered prejudice in the sum of £32. 2s. per day that is for 8 days £256. 16s. in British money or Rs. 3,858 the equivalent thereof at the rate of exchange ruling at that date.

The plaintiff further alleges that the *Taïf* was made to go out of the harbour on the 18th March without a pilot, though the Captain had applied for one, and that the *Taïf*, whilst swinging, happened to come into collision with the *Eurydice*, whereby this last vessel suffered damage valued £1,000 by the Master, that the *Taïf* was arrested in virtue of process from the Vice Admiralty Court on the 25th March, as she was preparing to leave for Bombay, in the afternoon of that day, and that she had to pay by way of compensation the sum of Rs. 2,203.90 which the Plaintiff alleges he is entitled to claim from the defendants.

The Plaintiff further says that, in consequence of the action entered by the *Eurydice*, the *Taïf* could only proceed on her voyage in the evening of the 26th March, while she was ready to go the day before, and the prejudice for that day's delay is £32. 2s. or Rs. 481.51 ; also that to proceed outside the Bell Buoy and to return from the quarantine ground into the harbour, the *Taïf* burnt 30 tons of coals for which Rs. 750 are claimed.

Certain preliminary pleas were set up in the defence, but as they were given up, we have to take notice only of the pleas on the merits which are: 1o. That the proceedings and resolutions of the General Board of Health in connection with the quarantine of the *Taïf* are legal and valid ; 2o. That at a meeting of the Board of the 16th March 1887, referring to the arrival of the *Taïf* from Bombay, one of the members of the Board informed his colleagues that he heard, on valuable authority, that before the landing of the passengers from that vessel on the 7th March, a passenger had died on board, and that two other passengers had landed having small-pox, and that after due deliberation, the Board unanimously resolved, that the Health officer's report of the *Taïf* on the 5th March be forwarded to Government, with a request that the immediate attention of the Procureur General be drawn to the alleged false declaration made by the captain of that vessel ; 3o. That at a special meeting of the Board on the 17th March, the President informed the members that he had learnt that a deputation of several of the inhabitants headed by His Worship the Mayor had waited on the officer administering the Government, and asked him to take some steps for the quarantine of the *Taïf* and of the passengers who arrived by that vessel, and that he believed the matter was being considered by the Executive Council ; 4o. That by Proclamation No. 13, published in the Government Gazette No. 24 of the 17th March, the officer administering the Government, in virtue of the powers vested in him, ordered, with the advice of the Executive Council, that the provisions contained in Part III of Ordinance No. 8 of 1874 be put in force for a period of 3 months ; 5o. That at the meeting of the Board of the 17th March, in virtue of the powers conferred on it by Article 43 of Ordinance 8 of 1874, the said Board ordered that the *Taïf* be at once put into quarantine with all persons then on board the steamer ; 6o. That this order was approved by the officer administering the Government on the 17th March. as appears from Government Gazette No. 25 published

on the 18th March, and No. 27 published on the 19th March ; 7o. That at a meeting of the Board of the 23rd March, the members after having read over the Reports of the Procureur General to the Colonial Secretary dated 21st March, of the Crown Solicitor to the Procureur General, of the same date, were of opinion, acting up to the suggestions of the Procureur General, that it would not be advisable to continue the quarantine of the *Taïf* and resolved that she be admitted to pratique at once ; 8o. That, thereupon, the *Taïf* was allowed to return into the harbour ; 9o. That the action of the Board in this matter was taken bonâ fide and with the best intentions to safeguard the public health, and that when the enquiry made by the Procureur General proved that no disease occurred on the passage, that no false declaration was made by the captain of the *Taïf*, the quarantine was removed ; 10o. That by reason of the facts averred by the plaintiff, and which, as alleged, are traversed by the defendants, no action in damages can lie against them, their doings having been strictly legal ; 11o. That the *Taïf* came into collision with the *Eurydice* through no fault, negligence or imprudence on the part of the defendants, and that they cannot be held responsible for the prejudice directly or indirectly caused by that collision ; 12o. That the plaintiff has not incurred damages and has not at any rate the right under the circumstances to claim damages from the Board ; 13o. That if any loss has been suffered by the plaintiff it has been occasioned by "force majeure" for which the defendants are not legally responsible towards the plaintiff.

Several witnesses were heard with regard to the facts which preceeded the resolution taken by the General Board of Health on the 17th March, and we gather from the evidence as to what took place between the 5th March, the date of the arrival of the *Taïf*, and the 17th, day on which it was resolved both by the Board and by the Officer Administering the Government to send the *Taif* from her moorings in the harbour to the quarantine ground, that one of the passengers landed from that steamer on the 7th had gone to the District of Moka, where, on the morning of the 15th, it was discovered by Dr. Clarenc that he was ill with small-pox. Measures were at once taken to prevent the spread of the disease, and it was then said that a man had died of small-pox before the *Taïf* was admitted to pratique, and that two passeagers ill with that disease had landed. We can understand the panic with which the inhabitants of Port Louis, so often visited with epidemics, were seized and also that a deputation headed by the Mayor of Port Louis, should have waited on the Officer Administering the Goverment and asked him to take some steps for the quarantine of the *Taif* and the passengers who arrived by that vessel. But, on the other hand, it was for the competent authorities to obtain reliable information before acting as they did, and we cannot help thinking that they acted with too much precipitation, under the circumstances. In the first place, there was no disease on board the *Taif* which had been lying in the centre of the harbour since the 7th ; it is also proved that there had been no case of small-pox on board during the voyage. She had left Bombay on the 21st February and the longest period of incubation admitted by medical science, according to Dr. Clarenc, being 23 days, that period had elapsed on the 17th and there was no danger to be feared from the crew on board. All the passengers had landed and it was from them alone that danger, if any there was, could be feared. Besides it was easy to send at once for Dr. Pétricher, the health officer who had given pratique, who had seen the dead body of the man who had died on board before pratique was given and who, it was alleged, had died from small-pox. Dr. Pétricher had also examined all the passengers one by one, and had vaccinated them before he gave pratique, and he might have satisfied the Board that not one of them had small-pox when they landed. The history of the case of Moka by Dr. Chastellier, such as it

was laid before the Board on the 16th March, shows that when the man landed on the 7th he had no eruption, he felt feverish and it was only on the 10th that the eruption appeared. In presence of all these facts some of which were known to the Board on the 17th while the others might have been easily ascertained before action was taken, we must come to the conclusion that the Board has acted imprudently when on the 19th March it resolved that the *Taïf* be ordered at once into quarantine with all persons on board, and althongh this resolution was approved by the Officer Administering the Government, this approval is not a bar to a claim in damages by the plaintiff if he has suffered any.

It might perhaps have been argued for the defendants that the action, if well founded, should have been directed against the Government and not against the corporation called the General Board of Health whose resolutions must be approved by the Executive before they are carried out, but we have understood from the argument of the learned Substitute Procureur General that he did not wish to go upon that ground and was ready to admit that the defendants were responsible, if we found that they acted wrongly.

In the course of the argument the plaintiff's counsel alluded to Article 44 of Ordinance 8 of 1874 as the only one in virtue of which the General Board of Health could act with regard to ships lying within the harbours of this Island after pratique was given to them, and it was said that such powers were there limited to the cleansing, purifying, ventilating and preventing disease in those ships, but that those powers did not go so far as to order such ships out of the harbour to the quarantine ground. We think that such an interpretation cannot stand ; that Article 48 should be read with Article 43 in which more extensive powers are given to the Board for the prevention or mitigation of epidemic, endemic or contagious diseases, and that if an epidemic disease were to break out in a ship lying at anchor in the harbour of Port Louis the Board would have the power to take any measures necessary for preventing the spread of the disease and even if there was no other alternative, to order the ship to remove to the quarantine ground. If such had been the case when the order was issued to the *Taïf*, our judgment would probably have been different from what it is. We have no doubt that the Board acted with the best intentions, but in matters of this kind this is not a sufficient excuse in law. The Court has already ruled in a previous case (Colin vs. General Board of Health) that the powers of the Board under Article 43 of Ordinance 8 of 1874 are only permissive and not imperative, and cannot protect the Board from the consequences of the exercise of such powers in a way to prejudice the rights of private parties, unless circumstances are serious enough to warrant their action in the interest of the public. It may here be remarked that the present case differs from that of Colin vs. General Board of Health in this, that in the last mentioned case there was an actual outbreak of small-pox in Colin's camp, whereas in the present case there was no disease on board of the *Taïf*.

As we have already stated, we are of opinion that the action of Board on that occasian was precipitate and unreasonable, that they have assumed a responsibility, which the executive has shared by confirming the resolution of the Board, and we find the defendants liable in the sum of Rs. 3,822, as damages in favor of the plaintiff.

With regard to the damages claimed for the consequences of the collision of the *Taïf* with the *Eurydice* while moving from the harbour to the quarantine ground, we do not find the evidence sufficient to allow us to hold that the collision took place through the fault of the harbour officials acting, as alleged, as the agents of the defendants during

the removal of the *Taïf* from her moorings. It is true that there was no pilot placed on board, although the captain says that he had asked for one, the evidence is rather conflicting upon this point and it seems to us that if the captain considered that he could not without the assistance of a pilot on board, swing his vessel properly, he should have insisted on having one and declined to move in case of refusal. The captain, however, says in his deposition before the Master that he was commanding the vessel at the time of the collision, but under the orders of the Harbour Master who was in his steam launch, about 150 feet more or less from the *Taïf* and he adds: "Had I been left to myself I would "have got the boat into the center of the "channel properly; the vessel was not "brought into the center of the channel pro-"perly and this in consequence of the orders."

The captain who had already entered Port Louis harbour "very often" as he says, must have known well the center of the channel, and we are led therefore to believe that, not requiring the assistance of a pilot, he did not ask for the presence of one on board his vessel. We were told a pilot was not placed on board the *Taïf* because she was to be put in quarantine and that the operation of swinging a vessel in certain parts of the harbour is sometimes done under the orders of a pilot standing in a boat or launch by the side of the vessel. We may here remark that the text of the regulations does not require that the pilot be placed on board, and it may be that in certain cases, it was found sufficient, where space allowed it, to have the pilot at a short distance by the side of the vessel; but in most cases there can be no doubt that it is indispensable that the pilot should be on board the vessel to be swung or moored. However in the case of the *Taif*, the captain says in his deposition that, if left to himself, he would have avoided the collision which he attributes to the orders of the Harbour Master. We have carefully compared the captain's evidence with that of the Harbour Master and of Pilots Rault and Deshayes who assisted him at the time of the swinging of the *Taïf*, and we think that the weight of the evidence is in favor of the theory of the defence that the collision is due to the captain's own fault. The Harbour Master was in a launch at a short distance from the *Taïf*, the captain was on the bridge of the steamer, the swinging was very nearly completed when the captain started of his own will after the Harbour Master had plainly told him not to go unless he was clear of the ship on his LEEBOW; when he did move, the ship's head was pointed westwards and not northwestwards, as it should have been, and he ought to have steamed backwards for a little until he was in the right channel, which he knew well according to his own evidence. These are details which the captain should have himself perceived being on the bridge of his steamer. We are satisfied that the order to move on was not given by the Harbour Master and could only have been given by the captain from the bridge to the engineer of the *Taïf*; such order being given before the head of the vessel was in the proper direction, was evidently the cause of the collision. We must therefore hold that the Harbour Master cannot be considered responsible for the collision of the *Taïf* with the *Eurydice*, and as a consequence that the defendants cannot be called upon to repay to the owners of the *Taïf* the sum which they have thought it advisable to pay to the owners of the *Eurydice* by way of compromise.

We think that the plaintiff is entitled to recover two thirds of his taxed costs from the defendants.

SUPREME COURT

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APPEAL FROM DECISION OF DISTRICT COURT OF SEYCHELLES — FRENCH CONSULS— FAMILY COUNCILS—JURISDICTION GRACIEUSE— STAY OF PROCEEDINGS—AGENTS AND PRINCIPALS— REVERSAL OF JUDGMENT.

On an appeal from an interlocutory judgment and a judgment on the merits by the District Judge of Seychelles, in an action for revendication of an immoveable property, the Supreme Court held:

1o. *That in christian countries, French Consuls can only do acts "de jurisdiction administrative et gracieuse."*

2o. *That in virtue of instructions issued to them, they may hold family councils in certain cases, when the local authorities refuse to do so, but that the memorandum of the family council must then contain a special mention of the motives of that "intervention officieuse."*

3o. *That the family council, held in this case in Paraguay, before the french consul, not mentioning the refusal of the local authorities to act, it was not sufficient to allow minors to proceed with their real action.*

4o. *That the District Judge was wrong, however, in putting those minors out of the cause; that he should merely have stayed the proceedings to allow another family council to be held and produced to him.*

On the merits:

1o. *That an act of agency, made by the agent seven years after the death of the principal was good and valid, if the agent at the time was ignorant of the death of the principal.*

Judgment reversed with costs.

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DAYAN AND ORS.,—Appellants.

and

LOISEAU AND ORS.,—Respondents.

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Before

His Honor Sir E. J. LECLÉZIO, KT.,— Chief Judge.

and

His HONOR ANDREW MURE,—Puisne Judge.

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Hon. G. GUIBERT,—Counsel for Appellants.
V. DUCRAY,—Attorney for the same.

Messrs. L. CAASTELLIER & A. HUGUES,— Counsel for Respondents.

Messrs. J. MALLET & E. HUTEAU,— Attorneys for the same.

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Record No. 906.

6th. *February* 1839.

This is an appeal from two judgments of the Court of Seychelles. The first one is an interlocutory order ruling that some of the appellants could not be heard, because they were minors and their guardian had not been authorized by a family council held before the proper authority to bring an action "en revendication". As a fact, Mrs. Dayan the mother of the minors, had been authorized by a family council, held in Paraguay, before the French Consul (the parents of the minors being French subjects) to enter the action; but the learned judge at Seychelles ruled that this family council was not a valid one, because French Consuls have no right to hold family councils in christian countries, except when the local authorities refuse to take the necessary measures, and that he had no evidence as to what the law of Paraguay prescribed.

We read in Dalloz V. Consuls No.57, that on the 29th. November 1833, special ins-

tructions were issued in France " sur l'exer-
" cice de la Jurisdiction consulaire en pays
" de chrétienté " which limit the competency of French consuls in those countries to acts of " jurisdiction administrative et gracieuse" and that the consuls may, in virtue of later instructions, hold family councils in certain cases, when the local authorities refuse to do so, and it is added " que la délibération doit " mentionner les motifs de cette intervention " officieuse " See also Le Clerq et de Vallot Guide pratique des Consulats Vol. 2 P. 360-61, in the same sense. Now, in the document tendered in this case there is no mention that the local authorities refused to hold a family council for the purposes therein set forth, and in the absence of a special consular convention between France and the Republic of Paraguay, which if it exists, has not been shown to us and which we have not been able to find in the collection of French Laws, we think that such as it is, the family council is not sufficient to allow the minors Dayan to go on with the case. However, the judge ought to have stayed the proceedings for a reasonable time to allow a better family council to be produced by Mrs. Dayan— See the case of Louhé, Piston's Report 1865 P. 97:

The learned judge allowed the case to go on between the Plaintiff who was of age and the defendants, and on the merits, gave judgment for the defendants with costs. The claim is for about one acre alleged to form part of, land belonging to one Pasquier, the Plaintiff's grand father, who left Seychelles a short time after 1820 leaving for his agent one Paris Leclerc.

On the 23rd. of March 1842, an instrument under private signatures between Leclerc, as agent of Pasquier, and Miss Aimée Dumesnil, represented by Casimir Fondaumière, explained that on the 13th. April 1820, Pasquier had sold to H. Fondaumière a plot of land of 4 or 5 arpents at Mahé with the buildings erected thereon; the price was to be a " rente viagère "; that on the 11th. May 1823, H. Fondaumière by another deed had sold that property to Miss Dumesnil who was to pay the " rente viagère " that she owed arrears, that Leclerc had begun legal proceedings for that claim and other claims, that to avoid a sale by levy, she had proposed to give in payment all her immoveable properties including the property at Mahé, that Leclerc accepted and discharged Miss Dumesnil; that deed was registered on the 12th. January 1854.

On the 13th. July 1854, the Deputy Curator of Vacant Estates at Seychilles appeared before a Notary, and declared that he had been sent in possession of the property of Louis Marie Pasquier, absent, on the 7th. July 1854, by order of the Magistrate and deposited the deed of the 23rd. March 1842. The curator took possession of the land Pasquier at Mahé. A short time after, one Jérémie Pagbeta, a clerical gentleman, came forward as agent of a nun, Miss de Coqueroy, Soeur Marie du Carmel, and presented to the Curator Dupuy a document purporting to be a sale to Miss de Coqueroy by the heirs Beauvoir, made by Notarial deed at Reunion, in November 1855, of the " Maison Pasquier " at Mahé, and Dupuy provisionally delivered the key of the house to the Reverend Jérémie, reserving his right to correspond with the curator in Mauritius. Later, on the 22nd. January 1857, Dupuy appeared together with Reverend Jérémie before a Notary at Mahé and definitively handed over the property to the Reverend Jérémie as agent of Miss Coqueroy. Since that time, the defendants, by themselves and their predecessors who hold from Miss Coqueroy, appear to have been in possession of the land claimed; but the judge held that the defendants could not avail themselves of the prescription invoked by them, because it had been interrupted by the minority of the Plaintiffs or their predecessors, and that if the Plaintiff had made out a better written

title than the defendants, he would have ruled that she was entitled to judgment.

The whole case, according to the view expressed by the learned judge, therefore depends upon the title of the Plaintiff.

The first title invoked by the plaintiff is the deed of the 13th. April 1820, before Notary Dumont, by which Pasquier sells to Henri Fondaumière the land and buildings at Mahé, and even the furnifure in the house, which shows that he was in possession. The title alleged by Pasquier is a concession by Lesage, Commandant aux Seychelles. It appears that the concession cannot be found, but in 1842 Miss Dumesnil is still the owner to all appearances, for she gives back the property in payment to the agent of Pasquier, and her possession is proved by the evidence of the witness Gauthier, who also says that Fondaumière lived there too, while another witness Thomy D'Offray also swears that before Mr. St. Pern, Mr. Fondaumière lived there. The first witness speaks of that possession as being more, than 50 years ago. There is ample proof therefore, that possession followed on the deed granted by Pasquier in 1820. Some allusion was made to the fact that the deed of 1842 was registered only in 1854, but this is of no importance in the case as the defendants hold from Miss Coqueroy who bought in 1855 only from the heirs Beauvoir. These latter allege that they were owners as heirs of their father, who, on the 23rd. June 1835, got the property by exchange from his wife, a Miss Bérand, the only daughter of the lady who became Mad. Pasquier by a second marriage and who died in France in 1829. That is all the title of the Beauvoirs. We have not before us the deed of exchange of 1835, and we do not know what description was there made of the property sold in 1855 to Miss Coqueroy. Without that deed of exchange, the origin of the alleged right of the Beauvoirs appears to us to be essentially defective. It is admitted that Pasquier died in France in January 1835, so that when Leclerc took back the properties in payment in 1842 Pasquier was dead, and the learned judge has ruled that what Leclerc did in 1842 was null, his mandate having come to an end by the death of Pasquier, according to Article 2008 of the Civil Code. "Si le mandataire "ignore la mort du mandant, ce qu'il a fait "dans cette ignorance est valide," but the judge held that the plaintiffs, who represent Pasquier, not Leclerc, should have proved that Leclerc was ignorant of the death of Pasquier. It may be remarked that Miss Dumesnil or her representatives do not appear to have questioned the validity of the deed of 1842. Can Miss Dumesnil be presumed to have been of bad faith? If the deed is valid as to her, and invalid as to the heirs Pasquier, they would have no recourse against her. But taking all the circumstances which accompanied the deed of 1842 into consideration, we think that there is sufficient evidence that Leclerc was of good faith and was really ignorant of the death of Pasquier in 1842. Miss Dumesnil was sued and seized. If the death of Pasquier was then known at Seychelles, she would have certainly invoked it and refused to deal with Leclerc. In 1854, the Curator was sent in possession of the property of Pasquier, *absent* not *dead*.

This shows that even in 1854, the death of Pasquier was not known at Seychelles. It was only in 1873 that Dayan moved for the first time, and by bringing his action, he ratified what had been done by Leclerc.

It was stated, in the course of the argument on appeal, that there was no proof that C. Fondaumière was agent of Miss Dumesnil nor that Leclerc was agent of Pasquier, but these points do not appear to have been taken in the Court below, and the dates of the powers of attorney alleged, as well as the names of the notaries who drew them up being given in the deed of 1842, we cannot take any notice of those objections now. The same observation may be

made as to the objection that there is no proof that Miss Dumesnil bought from Fondaumière.

For the respondents, it was also stated that the Curator, having handed over the property to Miss Coqueroy in 1857, had thereby admitted her title as good, but we do not think that what he did then can bind the heirs Pasquier, if they show that they had a better title than the heirs Beauvoir. The real point at issue is in our opinion whether the property belonged in 1820 to Mr. or to Mrs. Pasquier. The learned judge appears to consider that there is some confusion as to that question, because in the same year there was a sale made by Mr. and Mrs. Pasquier to Dodero of several plots of land they had on Praslin Island. This sale took place on the 30th. March 1820 before Notary Dumont, the same Notary who drew up the sale made by Pasquier of his land at Mahé to H. Fondaumière on the 13th. April 1820; and in the deed of sale to Dodero of the lands at Praslin the plots of land belonging to Mrs. Pasquier, formerly Widow Bérand, are distinguishrd from these belonging to Mr. Pasquier. We are therefore led to believe by the comparison of these two deeds drawn up by the same Notary at an interval of 14 days, that the house and land at Mahé sold by Mr. Pasquier alone to H. Fondaumière was really his own property and not that of his wife. Since the deed of 1820, he clearly brings out the fact that certain properties belonged to Mrs. Pasquier, it is impossible to hold that he would not make the same clear distinction in the other deed of nearly the same date. In the deed under consideration, Mr. Pasquier is the sole grantee of the deed and the property is described as belonging to him. In determining this case, we must not forget that we are in presence of parties who say that they derive their rights from Widow Bérand, who was Mrs. Pasquier in 1820, and of other parties who say that they are the heirs of Mr. Pasquier. If we find that, in 1820, the property appears to have been bona fide owned by Mr. Pasquier alone, the conclusion must be that Mrs. Beauvoir, the only heiress of Widow Bérand (Mrs. Pasquier) had really no claim to it when, in 1835, she gave it by way of exchange to her husband Mr. Beauvoir, and that the heirs Beauvoir were not entitled to sell that property to Miss Coqueroy in 1855.

In the course of his written judgment, the learned judge calls the copies of the deeds of sale made before Dumont to 1820, extracts from the Registration books of Mauritius, and adds that the deeds themselves should have been produced. We have examined those copies and we think that the learned judge must have been labouring under a misapprehension. They are taken not from the Registration books, but from the Minutes themselves deposited in the Archives of the conservator of mortgages, they are therefore valid evidence according to our Law, and not secondary evidence.

In conclusion we must hold that 1o. The prescription invoked by defendants having been interrupted by the minority of the heirs Pasquier, the defendants cannot avail themselves of it. 2o. That the property belongs to the heirs of Mr. Pasquier and not to those of Widow Bérand (Mr. Pasquier).

The Magistrate's judgment on the merits must therefore be set aside with costs.

The present judgment will practically benefit the minors Dayan, but it will be for the person who represents them at Seychelles to see whether he has sufficient authority now to act on their behalf. With regard to the interlocutory judgment of the learned judge, we say nothing as to costs, having already expressed the opinion that he ought to have stayed the proceedings to grant time to Mrs. Dayan, to be "recta in curia" as guardian of her minors, and we remit the case to him to grant an adequate time

to the party representing Mrs. Dayan at Seychelles, if need be, to take the necessary steps and thereafter, if need be, and if asked, to give decree in favor of the minors Dayan.

SUPREME COURT

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APPEAL FROM CONVICTION—ORDINANCE 12 OF 1878 — ARTICLES 134-151 — ORDINANCE 1 OF 1879—ARTICLE 6—PENAL CODE, ARTICLE 323—JURISDICTION OF DISTRICT AND STIPENDIARY COURTS — SERVANTS UNDER ENGAGEMENT—CONVICTION QUASHED.

The appellant had been condemned under Article 323 *of the Penal Code, by a District Magistrate, to imprisonment and fine, for having enticed away and employed a servant under engagement.*

Held by the Supreme Court :

1o. *That by Article* 134 *of Ordinance* 12 *of* 1878, *District and Stipendiary Courts had, formerly, concurrent power to sentence to fine and imprisonment, under Article* 323, *for enticing away or employing servants under contract of engagement.*

2o. *That, subsequently, the penalty enacted by Article* 6 *of Ordinance* 1 *of* 1879, *for employing engaged servants was made only a fine of Rs.* 100.

3o. *That Article* 6 *of Ordinance* 1 *of* 1879 *had thus, impliedly, abolished that part of Article* 323 *of the P. C. which deals with illegal employment of servants.*

4o. *That by Article* 10 *of Ordinance* 1 *of* 1879, *that Ordinance is to be read and construed as part of Ordinance* 12 *of* 1878.

5o. *That by Article* 250 *of Ordinance* 12 *of* 1878, *all complaints for any offence or contravention against the provisions of Ordinance* 12 *of* 1878, *must be brought before Stipendiary Courts.*

6o. *That the jurisdiction thus given was exclusive, and that as part of the plaint here was for illegally employing a servant under engagement, the District Court had no jurisdiction, as it could not apply Ordinance* 1 *of* 1879.

Conviction set aside.

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BOOCHIAH,—Appellant.

and

QUEEN, — Respondent.

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Before

His Honor Sir E. J. LECLÉZIO, KT.,— Chief Judge.

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

Hon. G. GUIBERT,—Counsel for Appellant.
V. MARJOLIN,—Attorney for the same.

Hon. L. ROUILLARD, Substitute Procureur General,—Appears for the Respondent.

J. GUIBERT, "Crown Attorney",—Attorney for the same.

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Record No. 559.

21*st. March* 1889.

The appellant was, on the 5th. June last, in the District Court of Savane, sentenced to two months imprisonment and fifty Rupees fine for having enticed away and employed three Indians, under engagement to *Britannia* Estate.

Amongst the grounds of appeal, one impeaching the jurisdiction of the District Magistrates deserves our careful consideration. When the Labour Ordinance 12 of 1878 was passed, special provision was made

(Article 194) that Article 323 of the Penal Code, which enacts a penalty not exceeding six months imprisonment and a fine not exceeding $ 25 against those who shall have enticed away or employed any servant du'y engaged, should continue to apply to employers and servants under Ordinance 12 of 1878. The same Article further enacts that the provisions of Article 323 of the Penal Code may be enforced before Stipendiary Courts. This provision gave to the latter Courts concurrent jurisdiction with that exercised by District Magistrate under the ordinary law of the Colony. In the following year, Ordinance 12 of 1878 was amended by Ordinance 1 of 1879 which contained amongst other enactments one (Article 6) restricting to a fine not exceeding one hundred Rupees the penalty against any "person knowingly harbouring, lodging, "or employing a servant engaged under "written contract of service to another "person." By that article, damages were allowed to the person whose servant had been legally harboured, lodged or employed. We are, therefore, in presence of two enactments both of which relate to the same offence of employing a servant engaged under a contract of service to another person, but as the Ordinance of more recent date inflicts a lesser penalty, it is obvious that it impliedly repeals, so far, that part of Article 323 of the Penal Code in which the heavier punishment is enacted, and, as a consequence, the offence of unlawfully employing a servant under written engagement of service to another person is now no longer punishable under Article 323 of the Penal Code, but under Article 5 of Ordinance 1 of 1879. The same doctrine was laid down by the Court in the case of Procureur General v. The Stipendiary Magistrate of Grand Port, Piston's Reports 1880, p. 15.

Another clause (Article 16) of Ordinance No. 1 of 1879 further enacts that the Ordinance shall be read and construed as part of Ordinance 12 of 1878. Now, Article 251 of the Ordinance last referred to provides that.....all complaints for any offence or contravention against the provisions of Ordinance 12 of 1878 (of which Ordinance No. 1 of 1879 must be held to form part) shall be brought before the Stipendiary Magistrate. Here a jurisdiction is given which is exclusive, and we hold that whenever the charge against a person is of having knowingly employed a servant under contract of service to another, the District Magistrate has no longer jurisdiction, as he is unable to apply the only law under which the offence is punishable, namely Article 5 of Ordinance No. 1 of 1879, as to which the Stipendiary Magistrate alone has jurisdiction.

It seems, indeed, a strange state of matters that, whilst District Magistrates still remain competent to entertain prosecutions under Article 323 of the Penal Code for enticing away a servant engaged to another person, they have no longer any jurisdiction to try complaints for employing the same servant, and as the two offences are distinct, the heavy penalty for the former offence provided by the clause of the Penal Code may still be inflicted by a District Magistrate, whilst for the other offence, for which a lesser penalty is incurred, the Stipendiary Magistrate is alone competent. The difficu'ty in this case arises from the fact that in one and in the same count of the information, the appellant was charged before the District Magistrate with having enticed away and employed three Indians under contract of engagement to another person and the District Magistrate, without distinguishing between the two offences, found the appellant guilty as charged and sentenced him to imprisonment for two months and to a fine. Now, as before explained, for one of the offences the Magistrate was competent, whilst for the other he had no jurisdiction.

It was argued by the Respondent that Article 2 of Ordinance 1 of 1879 having added the word "master" to Article 134 as well as to other Articles of Ordinance 12 of 1878, that showed the intention of the

Legislature to leave Article 134 untouched and no to interfere with the jurisdiction of the District Magistrate in the matters mentioned in it. The weak part of this argument is that the question of jurisdiction now at issue is independent of the wording of Article 134, as it arises entirely from the implied repeal of Article 323 of the Penal Code by Article 5 of Ordinance No. 1 of 1879 so far as illegal employment is concerned.

It was also attempted on the part of the Respondent to found an argument on an opinion incidentally expressed by this Court in the case of Procureur General v. The Stipendiary Magistrate of Grand Port above cited, but the facts are not analogous.

In the case referred to, a complaint for illegal employment had been filed in the Stipendiary Magistrate's Court, but the Magistrate had sentenced the defendant to a heavy penalty, not under Ordinance 1 of 1879, but under Article 323 of the Penal Code. The judgment of the Stipendiary Magistrate was held to be wrong, because he had applied Article 323 of the Penal Code, in sentencing the accused instead of Article 5 of Ordinance No. 1 of 1879; but in the course of the argument in the case referred to, it was suggested that as the facts proved amounted to both the enticing away and the employing the Stipendiary Magistrate was right in sentencing under the Penal Code, the Court declared that had the charge before the Stipendiary Magistrate been for enticing away and employing alone, the Stipendiary Magistrate might have applied the Penal Code and the penalty of six months inflicted by him would have been in conformity to law.

We are strongly inclined to acquiesce in that view when the two charges are brought before the Stipendiary Magistrate who is competent to try both. But the present case, in which the District Magistrate entertained a prosecution for two effences charged in the same Court in one of which he had no jurisdiction, is widely different.

It was also urged that the fact of giving employment might be held to have been introduced as an aggravation of the charge of enticing away for which the District Magistrate was clearly competent, but we cannot see on what ground that distinction can be made, the two offences being entirely distinct one from the other.

We consider, therefore, that we have no other alternative but to quash the conviction.

SUPREME COURT

APPEAL FROM DECISION OF VICE-CONSUL OF MADAGASCAR—CLAIM OF MONEY—ENGLISH LAW—COMMON LAW—CHOSE IN ACTION—RIGHTS OF THE HUSBAND—HIS INTENTION HERE—JUDGMENT REVERSED.

The appellant sued the respondents before the Vice Consul of Madagascar's Court for recovery of money she had lent to them in the life time of her husband.

The husband had signed the document as an approval of the transaction and for the authorisation of his wife.

The Vice-Consul of Madagascar ruled:

A. That the appellant's husband having married her in India and having long resided at Madagascar as British Consul, the rights of his widow must be determined by the English Law.

B. That the claim formed part of the Estate of the appellant's late husband and that she had no right to sue for the same.

By the Court:

With regard to A:

The law of England is the one applicable to this case.

With regard to B:

1o. *It is true that, under the common law, when there has been no marriage settlement, every thing which the wife has before marriage, or of which she becomes possessed during her coverture, belongs to her husband.*

2o. *But, when a chose in action is possessed by a feme covert, the husband may elect to let his wife have the benefit of it.*

3o. *The circumstances of the case show that this was the husband's intention here.*

Judgment reversed with costs.

WIDOW PACKENHAM, —Appellant.

and

WILSON & Co.,—Respondents.

Before

His Honor Sir E. J. LECLÉZIO, Kt.,—
Chief Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

L. CHASTELLIER,—Counsel for Appellant.
G. RITTER,—Attorney for the same.

G. GUIBERT,—Counsel for Respondents.
E. GANACHAUD,—Attorney for the same.

Record Nos. 912, 913, 914.

13*th. May* 1889.

On the 18th. April 1888, the appellant entered an action before Her Majesty's Vice-Consul at Tamatave, for recovery of the sum of $ 8,891.76 lent by Mrs. Packenham in the life time of her husband, to wit on the 12th. January 1882, to the firm H. Wilson & Co. as evidenced by a documënt under private signatures bearing the same date. That sum of $ 8,891.70 included a sum of $ 4,100.95 which in a previous settlement made between the same parties on the 26th. November 1880, had been found due by Hardwick Wilson & Co., to the appellant for advances made to the estate *Melville* at Madagascar.

In the documents above referred to, Widow Pakenham appears as stipulating in her own name and disposing of money belonging absolutely to her. The documents are twice signed by Mr. Packenham. The first signature is preceded by the words " pour autorisation de mon épouse " and the other signature by the word " approuvé."

On the 8th. April 1886, Mr. Packenham having died in the interval, Mrs. Packenham stipulating in her own name, granted under certain conditions, further delay to Wilson & Co., for the payment of their debt, but these conditions not having been fulfilled, Mrs. Packenham claimed immediate payment of the debt.

It was argued before the Vice Consul that the late Mr. Packenham having contracted marriage in India, whilst an officer in the British army and having subsequently come to reside in Madagascar as British consul, the rights of his wife must be determined according to the principles of English Law. It was further urged that according to that law, the claim against Hardwick Wilson & Co. formed part of the Estate of the late Packenham, and that the appellant had no title or capacity to sue the defendants.

This plea was admitted by the learned Vice Consul, who dismissed the action with costs.

This Court agrees with the Vice-Consul in the opinion expressed by him that the law of England should apply to this case, but, after due consideration, we have come to the conclusion that under the circumstances disclosed to us, Mrs. Packenham is entitled to make that claim her own and that she can legally sue upon it.

It is quite true that in Common law,

when there has been no marriage settlement, every thing that the wife has before marriage and every thing of which she become possessed during coverture is the property of the husband, and that if the wife has entered into any contract or becomes possessed of choses in action, the husband is entitled to sue upon them and make the proceeds his own. But, independently of the provisions of the married women's property Acts of 1870 and 1882, when a chose in action, such as a bond or note, is possessed by a feme covert, the husband may either elect to let his wife have the benefit of it or, if he thinks proper, he may take it himself. If he sues on the bond or agreement, it is a clear expression of his intention to appropriate the proceeds to his own benefit, but if he dies without having reduced into possession the choses in action belonging to his wife, then the remedy on them survives to the wife — Gaters v. Madeley 6 M. and W. p. 426.

In Lloyd v. Pughe L. J. 42, p. 282. Ch: Lord Chancellor Selborne expresses himself as follows :

" For my part, I should be exceedingly " sorry to show the least inclination to rule " with any degree of narrowness or sublety " the law of cases of this kind in which " a person, whether a husband or stranger, " has transferred into the name of a married " woman, property which constitutes a chose " in action. I say I should be exceedingly " sorry to encourage any over refinement or " sublety in the definition of the law, so as " to suggest any serious doubt as to the " validity of such transactions both when " they are intended to create an immediate " and irrevocable trust for the wife and " when they are intended to vest in her " legal title. The leaning of my mind is " certainly in favour of the proposition that " the law does not forbid a legal title, " capable of taking effect by survivorship, " to be vested under all the varieties of " circumstances under which it is likely to " be the intention of the parties to the " dealing to create such a title. Of course " no such title could be created in favour " of the wife against the true owner of the " money constituting the consideration, if " he did not consent to the transaction ; but " if he did consent to the transaction, " whether he was a husband or a stranger, " for my part, it would require more than " I have heard from the authorities, to " satisfy me that there is anything in law " to prevent the transaction so taking effect, " that if the wife survived the husband, she " should have the benefit of the contract."

A similar opinion was expressed by Lord Coleridge in Ashworth v. Outram 46 L. J. Ch : P. 687.

Of course in such cases there must be absence of fraud and a clear indication of the intention of the husband. But what more significant fact could then be here of the husband's intention, than his intervention in all the documents produced for the purpose of giving validity to the agreements entered into by his wife, in her own personal name.

It results from all that we know of this case, that the late Mr. Packenham whose married life had been long, fully intended that there should be some property set apart for his wife, and as he remained of the same mind until his death, and did not take steps to resume possession of the claim which, to his full knowledge, stood in the name of his wife, we must hold that it became fully her property after his death.

The judgment of the Vice Consul is therefore reversed with costs.

The judgment of the Vice Consul in the matter of Widow Packenham v. Widow H. Wilson bearing No. 19/88, is also reversed with costs.

SUPREME COURT

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SEQUESTRATION AT MADAGASCAR — LAW OF MAURITIUS—LAW OF ENGLAND—RECEIVERS —WHEN APPOINTED—POWERS OF THE CONSULAR JUDGE—EXTREME CASES AND ABSOLUTE NECESSITY—ORDER SET ASIDE WITH COSTS.

The Vice-Consul at Madagascar had placed a sugar estate under "sequestration", in spite of the protest of a creditor, who appealed from such order.

The Court considered:

1o. *That the law of Mauritius about sequestration was not applicable to Madagascar.*

2o. *That the law applicable there was the English Law.*

3o. *That when a suit is pending, and there is absolute necessity to do so, the Courts of Equity in England appoint a Receiver, who receives and pays moneys, etc.*

4o. *That in certain cases of extreme necessity, measures, special and extraordinary, may be taken by the Consular Judge, at Madagascar, in order to protect the interest of the owner or holder of an immoveable property, as well of all the creditors.*

5o. *That no such absolute necessity existed in this case.*

The order of the Consul was set aside with costs.

—

WIDOW PACKENHAM,—Appellant.

and

H. WILSON & Co. AND OTHERS,—Respondents.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

L. CHASTELLIER,—Counsel for Appellant.
G. RITTER,—Attorney for the same.

G. GUIBERT,—Counsel for Respondents.
E. GANACHAUD, — Attorney for the same.

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Records Nos. 912, 913, 914.

13*th. May* 1889.

On the 4th. May 1888, Mr. Eugène Giquel, a creditor of the firm Hardwick Wilson & Co. for money lent for the working of the sugar estate *Melville*, situate in the Island of Madagascar, further alleging himself to be the holder of a mortgage on the Estate, through Jules Hardwick Wilson, his proxy and agent, applied to Her Majesty's Vice Consul in Tamatave for an order or decree placing the estate *Melville* under sequestration.

The grounds of the application, as set forth in the petition, are that the proprietors of the estate *Melville* had entered into an agreement with several cane planters for crushing their canes at *Melville*, that the manipulation of the sugar canes was to begin on the first of August 1888, that the sugar mill of the Estate was in such a state of detorioration, that it could neither manipulate the canes of the planters nor those of the Estate, that the firm Hardwick Wilson & Co., on failure of crushing the canes of the planters as aforesaid, would become liable to heavy damages, and that it was the interest of all parties concerned that the Estate *Melville* should be placed under sequestration.

At a sitting of the Consular Court held on the same day, (4th. May 1888) Mr. Macquet, Attorney at Law, on behalf of petitioner, moved the Court in terms of the petition. Several creditors of Hardwick Wilson & Co. appeared and stated that they did not object to the sequestration.

The appellant, Mrs. Packenham, a creditor of Wilson & Co. for $ 8871.70, through Mr. Desveaux, her attorney, moved to intervene,

and, on her intervention being allowed, she opposed the application on several grounds set forth at full length in the Record. After hearing parties, the judicial Vice consul granted the decree prayed for and appointed as sequestrator Mr. G. Dupuy, represented at Tamatave by Edouard Giquel, under the conditions set forth in a memorandum signed by Ed. Giquel and dated 4th. May 1888.

In the document last mentioned, we find that the sum to be advanced by Dupuy is not to exceed $5,500 including interest. It will, however, be noticed that in an estimate of expenditure by Dupuy, annexed to the memorandum referred to, the sums to be spent on the Estate amount to $5,500, not including interest and that the sequestration is calculated to last seven months.

It is further stated in the memorandum, that all the produce of the Estate is to be consigned to the sequestrator, that the sequestration is to last until the end of the crop, that any balance due to the sequestrator will be paid to him in preference to any other creditor, whether privileged or not, and that the sequestrator shall have most extensive powers for the management of the Estate. From the order of sequestration, Mrs. Packenham has appealed. The chief grounds for challenging the decision of the judicial Vice consul being, as it appears to the Court, the following :

1o. That no sequestration is allowed by any law in force in the Island of Madagascar. 2o. That by granting the motion for sequestration, the Court had assumed a greater jurisdiction than was given by the Order in Council of 4th. February 1869. 3o. That there was nothing before the Court to establish that the sequestration of the Estate was a matter of absolute necessity.

It appears from the expressions used in the Record that the learned Judge wished to decide the case brought to his consideration according to the principles of our Colonial Law of sequestration. Sequestration is a form of procedure well known in Mauritius when immoveable or moveable property is the object of litigation (Art. 1961, 66). By virtue of local ordinances, sequestration of immoveable property may also be granted in cases where proceedings in ejectment have been instituted, or when a licitation of immoveable properties, i. e. a judicial sale between co-owners, has been begun. However, a mere perusal of the Record shows that the circumstances under which the judicial Vice Consul granted the sequestration of the Estate *Melville* differ widely from these in which the Supreme Court could have given such an order. It does not appear that any judicial proceedings had been instituted in Madagascar against the Estate *Melville*, nor was the ownership or possession of the Estate the subject of a law suit. If so, the Mauritius Law would not have allowed the sequestration of the Estate. The learned judge in the present case went far beyond what the Supreme Court would have considered itself empowered to order.

If we turn to the English Law, which, in our opinion, is the law to be applied in Madagascar by the judicial Vice Consul, the term sequestration which was used here is, we think, inappropriate, as it is but a mode of execution of judgments of the Superior Courts in England against an unwilling debtor. Courts of Equity in England have frequently appointed receivers whose duty consists in receiving and paying certain monies. It is, possibly, such an officer that the Consular Court of Tamatave intended to appoint, but it seems that in England, as well as here, the Courts will not appoint a receiver unless a cause is pending. (See, Smith Principles of Equity page 84). The Court is disposed to hold that in certain cases of extreme necessity measures, special and extraordinary, may be taken by the Consular Judge in Madagascar, in order to protect the interest of the owner or holder of an im-

moveable property, as well as of all his creditors. But after mature consideration, we think that no such absolute necessity existed in this matter. If the owners of the Estate *Melville* were insolvent, as alleged, and unable to work the Estate, and if the property had been seized by one of the creditors, we could have understood that, pending the proceedings for the sale, the judicial Vice Consul should have appointed a fit and proper person to manage it in the interest of all concerned. The Attorney who made the motion for the petitioner appears to have had in contemplation such a sale, for he moved for a sequestration pending the sale, but we find nothing in the Record to show that proceedings had been really begun to arrive at a judicial sale.

In the absence of more valid reasons than those appearing in the Record, any measure tending to interfere with the lawful rights of the creditors and to delay their action, cannot be countenanced by the Court. The order of the Consular Judge could have practically no other result but enable the owners of *Melville* to work that estate during a period of seven months, and until the expiry of that time, to paralyse the action of Mrs. Packenham whose position of creditor was then admitted in Court.

For the reasons given above, we are very clearly of opinion that the grounds set forth in the petition and upon which the judicial Vice Consul acted were not sufficient to authorize his interference in this matter, and we must reverse the order against which the present appeal is made, with costs.

SUPREME COURT

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CERTIORARI—BENCH OF MAGISTRATES—COMPOSITION OF THE SAME—MAGISTRATE FOR THE SMALLER DEPENDENCIES—ORDINANCE 23 OF 1888, SECTION 84.

Under Section 84 of Ordinance 23 of 1888, the titular Magistrate for the smaller Dependencies, when actually acting as a Magistrate in Mauritius, is not deprived of his qualification to be one of the three Magistrates who constitute a Bench, because an Acting Magistrate has been appointed as a substitute for him for the smaller Dependencies.

—

THE HONORABLE
THE PROCUREUR GENERAL,—Plaintiff.

and

A BENCH OF DISTRICT MAGISTRATES AND LAZARRE FILS,—Defendants.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor F. C. WITLIAMS,—Puisne Judge.

—

A. THIBAUD, Acting Substitute Procureur General,—Appears for Plaintiff.

J. GUIBERT, Crown Attorney, — Attorney for the same.

H. GALÉA,—Counsel for Lazarre.

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Record No. 24,795.

17*th. May* 1889.

Ordinance No. 23 of 1888 constitutes a Bench of three designated District Magistrates to which certain offences may be referred by the Procureur General, for trial. Failing one or more of three designated Magistrates, Section 84 of the Ordinance ordains that the Bench of three shall be completed "by the titular or Acting Police Magistrate for the smaller dependencies of

Mauritius ", if a barrister or advocate, or in his default, by other District Magistrates of Mauritius to be selected by lot. In the case before us, the Bench was composed of two of the designated District Magistrates and of a third who was and is the titular Police Magistrate for the smaller dependancies of Mauritius.

The contention against the proper constitution of this Court, was that its third member, the titular Police Magistrate for the smaller dependencies, was deprived of his qualification to act, because, as a matter of fact, an acting substitute for him as Magistrate for the smaller dependencies, had been sworn in a day or two previously. This contention was supported by the majority of the Bench.

The previous decision of the Court in the case of Queen v. Bangard was that the third Magistrate (Mr. Boucherat) was nonetheless the Magistrate for the smaller dependencies, because he had accepted an acting appointment in Mauritius.

The point to be decided now is whether this same Magistrate loses his qualification as titular Magistrate of the smaller dependencies, because another person has been nominated to act as Magistrate of the smaller dependencies in his stead. It is not denied or contested that upon the day when the Bench sat, Mr. Boucherat was titular Police Magistrate for the smaller dependencies of Mauritius.

This being so, we are of opinion that he was qualified to form a constituent element of the Bench, under Section 84 of Ordinance No. 23 of 1888, which does not, in our view, mean that the titular Magistrate of the smaller dependencies shall necessarily be, in addition, the acting functionary; but that he shall sit, whether the function of actually administering justice for the smaller dependencies is added to his titular qualification or not. When, as titularMagistrate, he is in Mauritius, the appointment of an acting substitute for him in the smaller dependencies would, no doubt, render him, as regards the smaller dependencies " functus officio ", but it would not, in our opinion, render him functus officio as regards the Mauritian Bench.

Taking this view, we do not think that Mr. Boucherat, titular Magistrate of the smaller dependencies, was disqualified from sitting upon the Bench of three Magistrates in Mauritius, by the mere fact that the appointment of an acting substitute for the smaller dependencies rendered him disqualified for the performance of his magisterial duties in the smaller dependencies themselves.

The decision of the majority of the Bench upon this matter does not, consequently, commend itself to our judgment. The whole difficulty has arisen from the wording of the Clause of the Ordinance, which ought to have been more clearly expressed, and was certainly susceptible of more than one interpretation. The Rule to be made absolute.

SUPREME COURT

APPEAL FROM DECISION OF THE MASTER — JURISDICTION—PROCEDURE—SMALL PROPERTY—ORDINANCE 19 OF 1868, ART. 70—DECISION FINAL—APPEAL REJECTED—COSTS.

A small property worth about Rs. 800 *having been seized and put up for sale, after a commandement, for a debt of Rs Rs.* 130, *due under a notarial obligation, " en simple brevet ", the debtor pleaded :*

1o. *That the title was not a " grosse exécutoire " and that no seizure should have taken place, till a return " nulla bona " of moveables upon warrant of the District Court.*

2o. *That the sum due being under Rs.* 1,000, *the Master had no juridiction.*

The Master having overruled the objections, and the debtor having appealed from his decision, the Supreme Court, held :

1o. *That the point before the Master was, properly, not one of jurisdiction but of procedure, in as much as the objection was not that the title was absolutely null and void, but only that the deed under which the debt was contracted was not equivalent to a "grosse exécutoire".*

2o. *That under Art : 70 of Ord : 19 of 1868, the judgment of the Master on the point was final.*

Appeal rejected with costs.

—

FRANÇOIS,—Appellant.

and

AMODE,—Respondent.

—

Before

His Honor ANDREW MUIR,—Puisne Judge

and

His Honor J. ROUILLARD,—Puisne Judge.

—

A, HUGUES,—Counsel for Appellant.
A. PITOT,—Attorney for the same.
H. GALÉA,—Counsel for Repondent.
P. D. CHAPERON,—Attorney for the same.

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Record No. 24,713.

23*rd. May* 1889.

On the 28th February 1887, a promissory note for one hundred and thirty Rupees in favor of the Respondent Amode was drawn up by Mr. Notary K|Morvan, by which the Appellant François bound himself to pay that sum on 1st. July following. A commandement to pay was served on François on 13th. November 1888, a property belonging to him at Beau Bassin was subsequently seized, and the Usher valued the whole subject as worth eight hundred Rupees. An order of sale was pronounced on 29th. November 1888 by the Master ; whereupon François, the execution debtor, on 4th. January 1889, applied for the nullity of these proceedings, with costs, against Amode, the seizing creditor, his chief plea being that the debtor's obligation was embodied in an act "en simple brevet" and such act was not an executory title. The Master's judgment of 25th. January 1889 repelled this plea, as he held that Par. 3 of Article 1 of Ord : 19 of 1868 had modified the provisions of Article 2213 of the Civil Code which requires that a title to seize shall be both authentic and executory. He thought that the ordinance only required that the seizure should be made in virtue of a notarial deed. The execution debtor, François, having appealed against this decision, has pleaded not only the point now stated, but also the want of jurisdiction of the Master, in respect that the amount of debt being within the jurisdiction of a District Court, no seizure of immoveable property could be made, unless by Warrant against real estate, issued by the District Court after a return of "Nulla Bona" of moveable property or insufficient distress.

The Respondent has pleaded that the appeal was incompetent, in respect that the decision of the Master upon any nullity in the case of a property not exceeding six hundred pounds is declared by the ordinance to be final and without appeal.

The Court cannot sustain the plea of want of jurisdiction. It is true that in the case of District Court judgments, the law directs that there shall be diligence first against the moveable estate, and only after it is shown to be insufficient to meet the claim, is a warrant granted against real estate. The real question before the Master was whether that form or the form followed by the seizing creditor was correct. That is not a matter of jurisdiction but of procedure.

The Respondent pleaded against the competency of this appeal that, in his view, the words "nullity alleged to exist in the proceedings" embraced all nullities, formal and radical, and especially the alleged nullity

in the present case. It appears that the nullity pleaded against this document is rather a nullity of form than anything else. It is not an objection that the title is absolutely null and void, that no debt whatever was contracted by the appellant, but only that the manner in which the debt was constituted is not equivalent to a "grosse executoire." It is an objection derived entirely from the form and procedure adopted in drawing up the acknowledgment of the debt and it is not a denial of the debt itself, or anything like a radical defect of title.

The 70th. Article of Ordinance 19 of 1868 provides that "in the case of a property not "exceeding six hundred pounds in value, "any nullity alleged to exist in the pro- "ceedings shall be objected to six days at "least before the day of sale." As the nullity pleaded in this case is of the nature we have indicated, we cannot but hold that it is a nullity existing in the proceedings and that therefore the decision of the Master's is final thereon.

We, therefore, refuse this appeal with costs.

SUPREME COURT

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APPEAL FROM MASTER'S DECISION — FRAIS DE DERNIÈRE MALADIE — PRIVILEGE ON MOVEABLES—SUBSIDIARY PRIVILEGE ON IMMOVEABLE—CONDITIONAL COLLOCATION—DELAY TO CLAIMANT—ARTS 2101, 2103, C. C.

The Master having refused to collocate a medical man for "frais de dernière maladie," upon the sale price of an immoveable property depending from a succession, the Supreme Court, on appeal, held :

1o. *That it was not shown that the medical man might have made good his claim upon the moveables which were, comparatively, of little value.*

2o. *That in order that the medical man should lose his subsidiary privilege over the immoveable estate, it must be shown that he had been in fault in dealing with the moveable estate.*

3o. *That the facts show that there had been no such fault here.*

4o. *That the proper course for the Master would have been to make a conditional collocation, and then to give a sufficient delay to claimant to make good his claim upon the moveable estate or show that their claim against it was irrecoverable.*

Judgment of the Master recalled with costs.

—

PÉTRICHER,—Appellant.

and

LEWISON & OTHERS,—Respondents.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

E. VAUDAGNE,—Counsel for Appellant.
E. PITCHEN,—Attorney for the same.

V. DELAFAYE,—Counsel for Respondents.
W. H. EDWARDS,—Attorney for the same.

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Record No. 24,703.

23*rd. May* 1889.

In this appeal, it appears that one Mrs. Crouch died on 26th November 1887. On 1st December following, her estate was inventoried, and the inventory bears that she had furniture to the amount of Rs. 111,25, c. as valued by the Notary, and contains a reference to several claims in regard to which no explanation is given to the Court. The inventory further bears that everything that had been inventoried was left in the pos-

session of Mrs. Crouch's universal legatee Colessmour. On the 31st December 1887, Colossmour and Orangine Orange went before Mr. Notary Jollivet and made an amicable partition in kind of the property which formed the succession of one Timan, who dying on 31st July 1881, by a last will made Mrs. Orange, his natural daughter, his universal legatee. She could only claim one half, and the other half went to hissister Mrs. Crouch. Certain property and estate, as above stated, Colessmour and Orange divided between them on 31st December 1887, and the property which is the subject matter of this appeal was apportioned to Colessmour. That gentleman on the same date of 31st December 1887, that is within a few weeks of Mrs. Crouch's death, granted a mortgage for the loan of fourteen hundred Rupees to Mr. Lewison who has been ranked by the Master's in preference to the Appellant. Mr. Lewison is not the mortgage creditor of Mrs. Crouch's estate, and before that estate could have been liquidated and its debts paid, he chose to lend his money to Mr. Crouch's universal legatee. He possesses no higher right or privilege than Colessmour had. His position is not a favourable one, as, in the opinion of the Court, he was either very imprudent or badly advised to lend his money to a universal legatee, so shortly after the death of his author or predecessor.

The same may be said as to the legatee "à titre particulier" Dorliska Christine. Her right is that merely of a special legatee with a gratuitous claim which is to be satisfied only after every creditor in the estate has been paid, whether privileged or not

As the moveable effects appear to have been left in the hands of the universal legatee and they do not appear to have been disposed of in any way, the court has to consider this case, as if the moveable estate had not been discussed.

It does not follow from this fact that a ranking of any kind ought to be refused to Doctor Petricher and those who have paid the "frais de justice", because they have claimed to be paid out of the immoveable estate without having discussed the moveable.

It depends on the situation of the moveable estate how the present question put should be answered. Article 2101 gives a privilege over the generality of the moveable estate to: 1st. the expenses of Justice, 2nd. the funeral expenses, and 3rd. the expenses of the last sickness of the deceased, concurrently among those to whom they may be due.

Then, Article 2105 enacts that in default of moveables, when the privileged creditors set forth in Article 2101 apply to be paid on the price of an immoveable subject in competition with the privileged creditors of the subject, the payments are to be made in the following order, 1s. the costs of Justice and others set forth in Article 2101, 2nd. the debts indicated in Article 2103. It is, therefore, clear that as the moveable estate appears to have been left in the hand of the universal legatee, and it has not been shown and does not appear to have been disposed of in any way, the persons claiming under "frais de justice et frais de la dernière maladie" have a preferable claim on the moveables, and, in default of that, they have also a preferable claim over the real estate. Among the debts set forth in Article 2103, does not occur that of a creditor who has lent money to the heir or representative of the deceased, and a mortgage creditor of the deceased has only a privilege in certain events. Further, on a *prima facie* consideration of the inventory of which we have obtained a sight, the total amount of the furniture possessed by the deceased was one hundred and forty one Rupees and twenty five cents. There were other moveable claims which read as if they were very uncertain. Reference is made to these facts here, only

to show that the moveable estate of Mrs. Crouch cannot be called a rich moveable estate.

On the other hand, we have Dr. Pétricher, a preferable creditor, who has had to obtain a decree for his claim before the District Court, serving an attachment on 12th. June 1888, and he explains that he did this as soon as he knew that Colessmoor had sold the property in question on 8th. May 1888, for two thousand rupees to two Indians. We cannot say that any excessive delay has occurred on the part of Doctor Pétricher, and it is clear that his claim has not in any sense been cut off by prescription. It appears almost as if it was accidentally and without any fault on his part that the distribution of the price of this immoveable subject preceded attachment and discussion of the moveable estate, which was in the first place subject to his privilege. It is true that it is by a special favour that the privilege for the claim of the last illness extends also over the immoveables of the debtor, that it does not affect equally the moveables and the immoveables, that it affects the immoveable estate only subsidiarily, and, consequently, a creditor cannot by his own act make this privilege a principal and primary claim over the immoveable estate. On the other hand, his entire exclusion from ranking would be unjust, because it is not shown that he can make good his claim by attacking the moveable estate, or that it is still in existence and is sufficient to meet it. We, therefore, find that as Doctor Pétricher who has not been collocated on the moveable estate seeks to be collocated on the real estate, it must be shown that he was in fault in dealing with the moveable estate in order that he should lose his claim over the immoveable property. Here, our opinion is that there is no such fault. It would be altogether different if the debtor, Mrs. Crouch, had had a rich moveable estate which was distributed among the ordinary creditors, and Doctor Pétricher had failed to put in a claim in preference to them. There is here a conflict of interest, and we are of opinion that the Master ought neither to have admitted definitively the claim of Doctor Pétricher on the price of the immoveable subject sold by the universal legatee nor ought he to have rejected it absolutely. He ought to have made a conditional collocation of the holders both of the "frais de justice and frais de la dernière maladie", and given these claimants a sufficient delay, say of six weeks, to make good their claims on the moveable estate or show that it was exhausted or their clam irrecoverable against it. We, therefore, recall his judgment and remit to him to act in terms of the above judgment. Doctor Pétricher to have his costs of appeal against Lewison; every other party to bear his own costs.

SUPREME COURT

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SALE OF BARE OWNERSHIP OF IMMOVEABLE PROPERTY — RESCISSION — ARTICLES 1677 AND 1678 C. C. — RESCISSION ALLOWED — APPRAISERS.

A contract for the sale of the bare ownership of an immoveable property can be the subject of a rescision under Articles 1677 *and* 1678 *C. C.*

As the price paid was, apparently, less than five twelfths of the true value of the bare ownership, the Court appointed three appraisers to report.

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BOOKY ALIAS DENIS,—Plaintiff.

and

FÉLIX, — Defendant.

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Before

His Honor Sir E. J. LECLÉZIO, KT.,— Chief Judge.

and

His Honor F. C. WILLIAMS.,—Puisne Judge.

—

V. DELAPAYE,—Counsel for Plaintiff.
A. ROHAN,—Attorney for the same.

F. SERRET, Counsel for Defendant.
W. EDWARDS,—Attorney for the same.

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Record No. 24,597.

29*th. May* 1889.

By the will of the late Edouard Constance, the Plaintiff in this case inherited a certain immoveable property in bare ownership, the usufruct being left to the testator's wife. In 1886, the plaintiff sold his interest in this property for two hundred rupees to the defendant, under notarial deed, subject to rédemption within two years, and in December 1887, when Widow Constance, the usufructuary, was eighty six years old, he, for a further consideration of fifty rupees paid by the defendant, Julia Félix, renounced in her interest his faculty of redemption above referred to. The Widow Constance being dead, the plaintiff now desires rescision of his arrangement with defendant, and asks the Court, under Articles 1677 and 1678 of the Civil Code, for the appointment of three appraisers of the property, with a view to showing that the two hundred and fifty Rupees paid for it was below five twelfths of its value, and that, consequently, he has a right to the rescision he prays for, under Article 1674 of the Code. It is not denied upon the part of the defendant that the property, at the date of its sale, may have been worth seven hundred and fifty rupees.

It was objected for the defence that a contract for the sale of bare ownership of property could not be the subject of rescision under the article; but, upon consulting the authorities (and especially Troplong Vente Vol: 2 No. 792 and Laurent (Vol: 24 No. 427 and following), we do not share that view. But we think that we must have serious grounds for a belief that the sum paid was really less than the five twelfths, before we can appoint the appraisers upon that assumption.

Now, the usufructuary Widow Constance was, as has been stated, eighty six at the date of the deed of renunciation, and according to the tables last issued from the General Registry Office in England, her expectation of life at that age extended to less than four years. If we allow interest for four years at nine per centum per annum on the two hundred and fifty rupees paid, or ninety rupees, the total reaches three hundred and forty rupees, the value at which the property is estimated by the Municipality for rating purpose.

But the case for the Plaintiff is that its actual value at the date of the sale was very much higher, and it is, indeed, a matter of common notoriety that property is generally estimated for purposes of rating below its actual value. The Plaintiff alleges it was worth fifteen hundred rupees in eighteen hundred and eighty seven, but, giving it only a presumable value of one thousand Rupees at that time, the sum of three hundred and forty Rupees is much less than the five twelfths of one thousand Rupees.

We are thus of opinion, upon the whole, that good ground has been shown to us for the appointment of appraisers as prayed for by the plantiff.

SUPREME COURT

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ACKNOWLEDGMENT OF NATURAL CHILD BY FATHER —ARTICLES 336 AND 339 C. C.—NATURAL FATHER APPOINTED GUARDIAN—ORDINANCE 4 OF 1871—ACTION IN CANCELLATION OF THE APPOINTMENT—ACTION EN DÉSAVEU AND ORAL PROOF— ACTION WRONGLY ENTERED— NON SUIT.

A man having declared a natural child as his, got himself appointed guardian of the said child by the Master, under Ordinance 4 of 1871.

The mother entered a principal action before the Supreme Court, asking the Court to cancel the above appointment or, at all events, to decree that she should be appointed guardian by preference.

By the Court :

1o. *Under Article* 339 *C. C , the mother can contest the declaration made by any man that he is the father of her natural child.*

2o. *The Court in such an action may proceed by every method of proof.*

3o. *As long as the mother had not had the acknowledgment of the alleged father set aside, the Master was fully entitled to appoint the said father guardian.*

4o. *The Master may, at any time, on proper cause shown, remove the guardian and appoint another, and there is a right of appeal from his decision.*

5o. *Here the proper course for plaintiff would have been a principal action in nullity of the acknowledgment of her child by the defendant.*

Plaintiff non-suited.

—

CERVEAUX,—Plaintiff.

and

POTAGE, — Defendant.

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Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

E. VAUDAGNE,— Counsel for Plaintiff.
V. MARJOLIN,—Attorney for the same.

F. HERCHENRODER,—Counsel for Plaintiff.
F. SIMONET,—Attorney for the same.

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Record No. 24,637.

1st. *July* 1889.

In her declaration, the plaintiff alleges, that on 24th December 1886, she gave birth to a female child in Port Louis, which child the defendant, on 21th January 1887, registered as legitimate and the issue of his marriage with the plaintiff. She alleges also that she was never married to the defendant, and that the act of birth was subsequently rectified by a judgment of the Supreme Court, by which the word "natural" was substituted for the word legitimate therein. It also appears that on the 19th. September 1888, the Master of the Supreme Court, in virtue of the provision contained in Ordinance No. 4 of 1871, appointed the defendant guardian of the child, he having applied for that position, and being in virtue of the act of birth the natural acknowledged father of the child.

The plaintiff avers that the defendant's acknowledgment was made without her consent and " aveu ", and she denies that he is the father, and asks the Court to cancel the appointment of the defendant, as guardian of the child, or, at all events, to decree that the plaintiff ought to be appointed guardian of her child by preference to defendant.

The defendant pleads that it is true he is the father of the natural child in question and that his appointment as guardian is good and valid. He also asks leave of the Court to prove by Parole Testimony " that on several occasions, both in private and public places, the plaintiff has admitted that the defendant is the father of her child."

Both parties are litigating " in formâ pauperis ". The pleadings of the parties' counsel were directed not only to the merits of the present action, but also to the competency of the proof offered by the defendant against the plaintiff's case.

In this case, the defendant alleging

himself to be the father of the child has, without any information or admission on the part of the mother, acknowledged himself to be the father in the act of the Civil Status of the child. By article 336 of the Civil Code, such an acknowledgment has no legal effect except as regards the father.

The object of this article was to protect women from improper and untrue declarations of motherhood, by which the honour of a woman and her family might be deeply affected. The indication of the mother, therefore, in such an act of birth, has no legal effect upon her and she is by that article protected against any untrue or arbitrary statement of that nature. Here the plaintiff, the mother, does not deny or disavow the maternity. On the contrary, in several affidavits and judicial steps of proceedings, and notably in the declaration with which the present suit began, she founds on the fact that she is the mother of the child in question. The 336 article of the Code cannot, therefore, be invoicked here to aid the rights of the mother. Referring to Demolombe, "de la Paternite", Par : 385, it appears that each parent is entitled to declare the birth of the child separately, a step which, of course, may be taken with the joint consent and act of the parents, the latter being the preferable method. But each acts for himself or herself and for his or her own responsability, and that, independently of all indication and of any admission on the part of the other. Each may avow a fact personal to himself, but not a fact which concerns the other. No doubt article 336 binds the father's personally but it does nothing more, and, by Article 339, every acknowledgment by the father or mother may be contested by all those who have an interest to do so.

This latter Article is the complement of the 326 Article and must be read along with it. If the declaration made under the first article is untrue or injures the rights of another, any one who has an interest may raise a principal action, and have it set aside and declared null. If the allegation of the plaintiff that defendant is not the father of her child is at all well founded, she can ask that the defendant's acknowledgment shall be held null and and void, and it appears as if the Court may in such an action proceed by every method of proof.

(See Laurent Vol. 4 Par. 73 and Demolombe de la Paternité. Par : 440 & 441).

The defendant, in virtue of the 3rd section of the Ordinance No. 4 of 1871, has procured himself to be appointed by the Master guardian of the child. But that section all thro' its provisions gives a preference of the office of guardian to the father who has acknowledged his illegitimate child ; if the father has not acknowledged the child, the mother may be appointed guardian, and it is only after the death of the father who has acknowledged the child, that the mother is, by preference, appointed guardian. According to the provisions of this article, the Master seems to have been clearly entitled to appoint the defendant who had acknowledged the child, to be its Guardian.

Until that acknowledgment of the father be taken out of the way, the mother seems to have no title to the official guardianship of the child. The Ordinance further contains a provision in its 6th article by which "if proper cause is shown that the said guardian should be removed, it is enacted that the Magistrate may summarily revoke the appointment of such Guardian and appoint another in its place. This is the very step which, in its result, the plaintiff asks the Supreme Court to order to be done in this suit, and there is an appeal provided to this Court from the inferior Magistrate's decision—In face of the enactments con-

tained in the third and sixth articles of this Ordinance, we think the Supreme Court cannot entertain the present suit as a principal action, and in the circumstances we nonsuit the plaintiff, but without costs.

SUPREME COURT

—

INJUNCTION— LICITATION—PARTNERSHIP—AFFIDAVITS — PRIMA FACIE EVIDENCE — NO INTERFERENCE FROM COURT.

An immoveable having been purchased with moneys belonging to the reserve fund of a certain "accord" between distillers, one of the distillers, at the end of the accord, sued for the licitation of the immoveable.

The Court was asked to order the stay of the licitation by an injunction, because that distiller had taken more money than he was entitled to, and, by special agreement, had ceased to be owner of the immoveable.

The Court refused the injunction, because the taking of the money and the agreement were both denied by the distiller in affidavits, and there was no proof thereof, except the allegation of the plaintiff.

An injunction will be granted only when there is some "prima facie" evidence which discloses good ground for interference by the Court.

PEZZANI & ORS.,—Plaintiffs.

and

BOUFFE & ORS.,—Defendants.

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for Plaintiffs.

E. SAUZIER,—Attorney for the same.

L. CHASTELLIER,—Counsel for Defendants.

—

Record No. 24,812.

3*rd. July* 1889.

JUDGMENT

Delivered by His Honor The Chief Judge.

This is a motion which is made by the plaintiff in order to obtain an injunction from this Court staying the proceedings in licitation, begun by the defendant, before the Master, of two distilleries which are said to have been purchased with moneys belonging to the reserve fund (*caisse de réserve*) of an agreement or accord, made between certain distillers.

It appears that, at a certain moment, there was a large surplus in that *caisse de réserve* and in order to employ it in a profitable manner in the interests of all concerned, of all the distillers who were partners in that *accord*, some of them, at first, purchased those two distilteries in t heir own names and, afterwards, gave declarations to the other interested parties, that they had a share in them, that they were the co-owners of those distilleries, and the defendant received a declaration from some of the plaintiffs in this case who had purchased the distilleries in their own names. The *accord*, at a certain moment, came to an end; and the defendant considering that her right of co-ownership entitled her to move for the licitation of those properties, there were proceedings in licitation begun by her before the Master.

Now, an action has been entered before this Court with the object of obtaining a decree of the Court, to the effect that the defendant has taken more money from the reserve fund than she was entitled to, and that, on that account, she has ceased to be the co-owner of the properties which had been purchased with the moneys belonging

to the reserve fund. The affidavits, which we have before us, allege the facts which I have referred to and many of those facts are denied for the defendant in the affidavit of her husband. For instance, it is denied that she has taken more money from the reserve fund than she was entitled to, and, in the second place, it is denied that the special agreement which is alluded to, and upon which this application is chiefly grounded, has ever been entered into; namely, that the fact of having taken more money than she was entitled to, has had for its consequence to take away from her the right of co-ownership which the two declarations given to her by some of the plaintiffs had conferred upon her. We have examined those affidavits and the pleadings which have been filed in this case, and we do not think that it is possible for us to interfere at the present stage of the proceedings.

An injunction can be granted only if there is some *prima facie* evidence which discloses good ground entitling the Court to grant it. In this case, for instance, there are two facts which are very serious and which have been denied by the defendant, so that they rest, at present, merely upon the allegations of the plaintiffs. The first of those facts is that the defendant has taken more money than she was entitled to from the reserve fund, the *caisse de reserve* of the *accord*.

This fact, by itself, is not sufficient to lead us to the conclusion that the plaintiffs are entitled, under the circumstances, to an injunction, but there is this other fact which is much more serious, namely, the allegations that the consequence of the first fact, that is to say of the defendant having taken more money than she was entitled to, has, by special agreement, deprived her altogether of her right of co-ownership in those two distilleries. We have there the allegation of a special agreement of a peculiar nature; I may say, of quite an exceptional nature, and we have nothing but the statement of the plaintiff upon which this allegation is grounded. This is completely denied by the defendant; the *accord* itself has not been produced; so that we have not sufficient *primâ facie* evidence before us of that special argeement, which is of such an exceptional nature. We think therefore that, *hoc statu*, we should not interfere with the exercise of the right which every co-owner has of asking for the licitation of a property of which he has a share. The "accord" it is said, has come to an end, the time has come for a liquidation, and unless we have before us strong *prima facie* evidence, tending to show that the defendant has entirely lost her right of co-ownership in those immoveable properties, we cannot prevent her from going on with the licitation.

We must, therefore, refuse the injunction which has been prayed for and with costs.

SUPREME COURT

APPEAL — FIVE DAYS GRACE — APPELLANT AT FAULT — DISMISSAL.

The appellant having been given fifteen days by the District Court of Seychelles to pay a judgment debt, claimed that he was entitled, besides, to the five days grace allowed for purposes of appealing.

By the Supreme Court:

1o. *In this case there was, really, no appeal, for the formalities essential to an appeal, under our law, were not complied with by the defendant.*

2o. *When an appeal from an inferior Court is not prosecuted, through neglect or default upon the part of the appellant to fulfil the necessary formalities, it is not to be treated as a "bona fide" proceeding entitling the supposed appellant to exceptional protection.*

Appeal dismissed, with costs.

Mc GAW,—Appellant.

and

PAYET AND WIFE,—Respondents.

—

Mc GAW,—Appellant.

and

PAYET AND WIFE,—Respondents.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

G. GUIBERT,—Counsel for Appellant.
A. DE COMARMOND,—Attorney for the same.

H. GALÉA,—Counsel for Repondents.
P. E. DE CHAZAL,—Attorney for the same.

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Record Nos. 917 & 918.

3rd. July 1889.

In these cases, which are appeals from the District Court of Seychelles, the real point to be decided by us is whether the appellant, who made the tender of a judgment debt at a date beyond the fifteen days allowed by the judge for payment, was or was not within his legal rights in so tendering. The case was an appealable case, and the appellant gave notice of appeal within five days allowed for such notice, but did not proceed any further in the matter of the appeal or even sign the necessary recognizance. He, nevertheless, claims that he is entitled to the five days grace allowed for purposes of appealing, in addition to the fifteen days allowed by the judge for payment.

There is no doubt that a defendant who gives notice of appeal and prosecutes it is entitled to protection until the appeal is disposed of, and it has been held in France that a penalty pronounced against him in default of submission to a judgment will not run against him, until the confirmation of such a judgment, if appealed against.

But upon the authority of a case from the Court of Dijon, reported in Sirey 1844-2-448, we are asked to go a great deal further and to hold that a defendant who gives notice of appeal and abandons it is entitled to protection against the original judgment from the date of the abandonment of such appeal, and that, in such a case, the date of the judgment is, in fact, the date when the appeal is abandoned.

We do not think that the Cout of Dijon in its "arrêt" intended to go so far as this, for the effect of such a doctrine would clearly be to place a premium upon fictitious notices of appeal lodged as a matter of delay, but never intended to be carried out.

The decision of the Court of Dijon established that an appeal regularly made gives protection against a judgment until the appeal is regularly and formally abandoned by the appellant or set aside by the Superior Court.

In the case before us, there was no regular abandonment or "désistement", and, in fact, there was really no appeal, for the formalities essential to an appeal, according to our law, were not complied with by the Defendant.

The Court of Paris (arrêt of the tenth day of December 1849, Sirey. 1350-2-26) held that an appeal discharged for not being made within the statutory delay, did not entitle the person making it to protection from the running on of damages, while the hearing of the appeal was pending, and this seems to us the safer and more reasonable doctrine viz: that where an appeal from our inferior Courts is not prosecuted

through neglect or default upon the part of the appellant to fulfil the formalities necessary to bring it before the Supreme Court, it is not to be treated as a "bonâ fide" proceeding entitling the party who has recourse to it to exceptional protection against the effects of the original judgment.

The appeals, in both cases, are dismissed with costs.

SUPREME COURT

—

DIVISION OF WATER — SMALL PROPRIETORS — LIABILITY OF GOVERNMENT — PROVISIONAL CHARACTER OF DIVISION OF WATERS.

A Sworn Land Surveyor having made, by order of the Court, a division of the waters of a river among "riverains", treated as a community a number of small proprietors in a bordering village, to each of whom it was not practicable to assign a trifling quantity of water.

He gave one share of water to that "community" and claimed a share of his fees from Government, as representing that community.

Held by the Court, that:

1o. *The Government is not a riverain and only appeared in the case to attend to the Public interest and, consequently, cannot be liable for any part of the fees due to the Surveyor.*

2o. *The Surveyor may make good his claim against those who may benefit by his Report.*

3o. *The shares of the small proprietors who are not desirous to take the same, must remain in the bed of the river till applied for.*

4o. *The right of Government to ask, at an ulterior date, that the reserve of one fourth of the waters of the river, now left in its bed for public wants, be increased, is especially reserved; the division of water in a stream having always, as far as the reserve in the bed thereof is concerned, more or less, a provisional character.*

—

ROBINSON,—Plaintiff.

and

CAYROU & ORS.,—Defendants.

—

Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

Hon. G. GUIBERT,—Counsel for A. Maillard Sworn Land Suryeyor.

G. RITTER,—Attorney for Plaintiff.

I. A. THIBAUD, Acting Substitute Procureur General,—Appears for Government.

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Record No. 23,737.

3rd. *July* 1889.

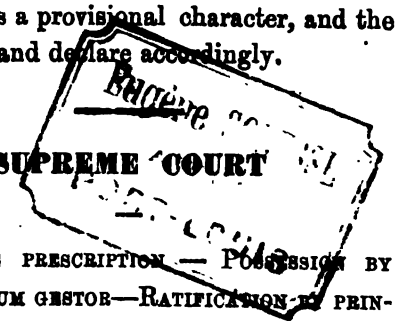
This is a Petition at the instance of Mr. Robinson of the Estate *Réunion* of which certain concessions specified in the petition are bordering the River Tatamaka, by which petition he seeks to have his share of the waters of the said river determined by the Court and the division of the waters thereof made by a competent person. After notice had been given to the Ministère Public and to all the borderers by advertisement and otherwise, as required by Regulations of Court dated 13th. June 1886, and after many of the borderers had appeared and stated their contentions on the subject in question, the Ministère Public being favourable to the application being proceeded with, the Court

ordered that Mr. Maillard be appointed to make the divisions of the waters of the said river, after considering whether there exists now in it a sufficient quantity of water to make such division and taking into account the natural wants of its borderers and of the public.

The first report of Mr. Maillard required some modifications in the opinion of the Ministère Public, and an additional report was subsequently filed by him. All parties have acquiesced in the conclusion of the Reporter, and the only points which we have to consider are questions raised between the Reporter and the Government. *Inter alia*, the former contends that as there is large village bordering the course of the river, and, close to it, a number of small proprietors possessing altogether about 900 acres of land, to whom he has assigned their share of the water as a whole, it is scarcely practicable to give each a very small quantity of water, and that he looks upon the village and the small neighbouring proprietors as a community represented by the Government. He moved the Court in these circumstances to order the Government to pay him the share of his fees appertaining to the 900 acres. The Ministère Public objects to this, arguing that the Government cannot be liable in the circumstances. The Court, in respect that the Government is not a party to the present proceedings and has only appeared to attend to the Public interest and to see that justice is done to all parties, finds that the Government is not liable in any share of the expenses of the Reporter, and reserves to him to make good his claim against those who may benefit by his report according to law.

In regard to the merits of the case, the Court approves, generally, the reports of Mr. Maillard dated 22nd. September 1886, as explained and modified by his second report, dated 3rd. May 1888, which is also generally approved of. We find that the shares of waters belonging to the applicant, Mr. Robinson, and the various respondents are and shall belong to them as stated in the said reports, but subject to the following modifications and reservations.

In presence of the statement of Mr. Maillard that a number of small proprietors are not at present desirous to take their share of the water from the stream, the Court orders that the said share of water shall remain in the bed of the river until applied for, and the Court, in conformity with the opinion of the Ministère Public, considers that one fourth of the whole water will constitute a sufficient quantity of water in the bed of the stream for public fountains and other public wants, and orders that that portion of water shall always remain in the river, reserving also the right of the Government to ask, at an ulterior date, that that reserve of one fourth be increased, if it become necessary to do so, the division of water in a stream having always, as far as the reserve in the bed thereof is concerned, more or less a provisional character, and the Court find and declare accordingly.



SUPREME COURT

ACQUISITIVE PRESCRIPTION — POSSESSION BY NEGOTIORUM GESTOR—RATIFICATION BY PRINCIPAL—RETROACTIVE EFFECT.

On a question of acquisitive prescription, the Court held that:

1o. *The possession of a "negotiorum gestor" may avail the party for whom it is said that he acted, provided that the said party has had knowledge of the acts of possession done in his name and has ratified them in a clear and positive manner.*

2o. *Such a ratification may have a retroactive effect, saving the rights of third parties.*

3o. *That the ratification could not, however, be now given by the son of the above party, the said party and the "negotiorum gestor" having died before any ratification took place.*

—

LEFEBVRE,—Plaintiff.

and

THE CURATOR
OF VACANT ESTATES,—Defendant.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

H. GALÉA,—Counsel for Plaintiff.
G. KŒNIG,—Attorney for the same.

L. CHASTELLIER,—Counsel for Defendant.
J. GUIBERT, "Crown Attorney",—Attorney for the same.

—

Record No. 23,128.

8th. July 1889.

After the judgment of this Court of the 4th. May 1888, the plaintiff amended his declaration and it now avers: that Widow Lefebvre did, since 1838 up to 1859, possess the portion of land in dispute through Henri Drenning, who acted on her behalf and as her "negotiorum gestor", that, subsequently, Widow Lefebvre did appoint as her proxy and agent in this Island, Henri Drenning, in terms of a power of attorney drawn up by a Notary in Paris on the 6th. May 1859, thereby ratifying all that had been done by Drenning as her "negotiorum gestor" touching the possession of the land in dispute; that Drenning in his capacity of proxy and agent of Widow Lefebvre, did lease the land to Auguste Planche for a period of four years from the 1st. July 1860; that at the expiry of the lease, Planche remained in possession of the land as lessee, or, at all events, as "negotiorum gestor" of Widow Lefebvre, until June 1873. The other averments of the declaration refer to questions which have been already disposed of by the judgment of the 4th. May 1888, and we will not take any further notice of them.

In a notice of facts dated the 10th. May last, the Plaintiff proposes to prove facts showing that Widow Lefebvre possessed the land in dispute from 1838 to 1860 through Drenning who acted as her "negotiorum gestor", and from 1860 to 1873 through Drenning, her agent, and through Planche, her lessee.

The questions which we have to decide now relate principally to the new position assumed by plaintiff by his amendments, namely, that Drenning was the "negotiorum gestor" of Plaintiff's mother, Widow Lefebvre, from 1838 to 1859 and that his possession was her possession, because she ratified and accepted what he, Drenning, had done on her behalf. We are disposed to accept the theory that the possession of a "negotiorum gestor" may avail the party for whom it is said that he acted, provided that the party for whom he acted has had knowledge of the acts of possession done in his name, and has ratified them in a clear and positive manner.

Such a ratification may have a retroactive effect, saving the rights of third parties. Demolombe Vol. 8 Contracts No. 219. In this case, it is alleged that Widow Lefebvre has ratified the acts of Drenning, and a copy of a power of attorney from her to Drenning is produced. This copy, which has been taken from the books of the Registration Office, on which it was inscribed when registered in Mauritius, is objected to as insufficient

legal evidence of a document really emanating from Widow Lefebvre. Without deciding this point of law, we are satisfied, after reading this document, that it does not contain any ratification of the acts of Drenning as "negotiorum gestor", it is a mere power to take possession of the land now in dispute, (à l'effet de prendre possession) under the apparent belief, that she, Widow Lefebvre, had a written title to it, and that to take possession was all she had to do to make good her right to the land. It is not possible to infer from the terms of this power that she had any knowledge of the acts alleged to have been done on her behalf by Drenning as her "negotiorum gestor" nor, if she had such knowledge, that she intended to approve of them and adopt them as her own, in other words, to ratify them.

This is the only document tendered with the view of proving ratification. There is no letter produced, no fact alleged tending to show that Widow Lefebvre ever knew that Drenning had acted as her "negotiorum gestor" while he was in possession from 1838 to 1859 and that she accepted his possession as hers. In fact, this is quite a new feature in the case, begun since 1885, and a modified position taken by the plaintiff, after the judgment of last year had decided that Drenning could not be considered as the author (auteur) of Widow Lefebvre, merely, because he had accepted to occupy and manage for her, as her, agent, the land of which he had been in possession before, in his own name and for his own benefit, and consequently, that she was not entitled to add to her possession that of Drenning.

The plaintiff argued further that, in case the Court were not satisfied that there had been ratification by Widow Lefebvre of the acts of Drenning as her "negotiorum gestor", as her heir and successor he was entitled to do so at present and that he in reality ratified Drenning's possession on her behalf by the new averments of his declaration. This contention does not appear to us to be tenable. In the first place, we may observe that the pleadings do not warrant this argument on behalf of the plaintiff, for the allegation in the amended declaration is that it was Widow Lefebvre who by her power of attorney to Drenning ratified the acts done by him as her "negotiorum gestor" Now that the Curator of Vacant Estates has been in possession for a third party since 1873, that Widow Lefebvre and Drenning are both dead, and that the heirs of this latter are not before the Court, the Plaintiff wishes, for the first time, in the course of an argument to raise the point that he may still ratify the acts of Drenning. We think that in these circumstances he is too late to take such a position as the one suggested by his counsel before the Court, and were he legally able to ratify the alleged acts of possession by Drenning for the plaintiff's mother from 1838 to 1859, such a ratification could not have now the retroactive effect which alone could be useful to his case of prescription.

Upon the whole, admitting that the facts alleged in the notice of facts of the 10th. May relative to the possession of the land by Drenning from 1838 to 1859, and also the fact that he so possessed as the "negotiorum gestor" of Widow Lefebvre, could be proved satisfactorily, we think that failing the evidence of a valid ratification having a retroactive effect, it would be useless for the plaintiff's case to hear witnesses to prove those facts.

The plaintiff being unable to add to his possession the possession of Drenning either as "auteur" as was decided by us in May 1888, or as "negotiorum gestor" for

want of a ratification, as decided to day, it would be of no avail to him to prove possession from 1860 to 1873.

We must therefore refuse the parole evidence which has been tendered by the Plaintiff with costs.

SUPREME COURT

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SAISIE-REVENDICATION—FRAUD—THIRD HOLDER—VENDOR'S RIGHTS—THEFT—TRICKERY—SAISIE MAINTAINED.

A vendor made a "saisie-revendication" of certain goods sold for credit, on the ground that the purchaser had given a false non existent security.

The purchaser, on whom the levy had been made, moved for the nullity of the seizure.

By the Court:

1o. *Had the goods passed into the possession of a bonâ fide third holder, it is probable that the "saisie" would have been bad, as a distinction should be made between goods obtained by theft and goods obtained by trickery or swindling.*

2o. *But the goods are still in the possession of the vendee, and as the condition on which the sale for credit took place remains unfilled through fraud on the vendee's part; the vendor has retained sufficient "property" in the goods to enable him to take legal steps for preventing their disappearance.*

Saisie-revendication maintained.

—

MIRZA,—Plaintiff.

and

CASSIM HADJEE,—Defendant.

—

Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

H. GALÉA,—Counsel for Plaintiff.
S. PIARROUX,—Attorney for the same.

W. NEWTON,—Counsel for the Defendant.
H. BERTIN,—Attorney for the same.

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Record No. 24,879.

29*th. July* 1889.

This is an application for the nullity of a *saisie revendication* made by defendant upon plaintiff on the fifteenth of July. On the sixth of July, the defendant sold to the plaintiff certain moveables on definite terms of credit as to payment, but upon the strength of what, defendant alleges, he subsequently found to be a false non existent security. He virtually accuses the plaintiff of obtaining the moveables the subject of this "saisie" from him by means of a trick and in fact by fraud. And he has entered an action against him for cancellation of the contract for revendication of such of his goods as have not been disposed of and for damages.

If this proceeding in "saisie revendication" had been taken against a third party who had purchased in good faith from the plaintiff, we might not have been disposed to combat the view that theft being a crime of a different nature to trickery or swindling, the plaintiff had acquired from the defendant a title sufficient to give a right to a third party as "acquéreur de bonne foi."

But the very case of the defendant is that plaintiff, against whom the *saisie revendication* was granted, is a principal party to the fraud whereby defendant was induced to part with the possession of his goods, and we cannot but agree with the conclusion of "Troplong (de la Prescription C. C. 2279, "Art. 1061) Le véritable propriétaire sera "toujours admis à prouver que le tiers "détenteur (and if the third party, surely "also the principal) a acheté de mauvaise "foi. La loi a voulu venir au secours de "ceux qui ont agi loyalement ; elle favorise "la confiance, mais elle reste sourde pour "ceux qui ayant acquis avec la conviction "du droit d'autrui, se sont rendus complices "de la spoliation et ne sont que de véritables "receleurs du bien d'autrui."

The argument urged upon us by the learned counsel for the Plaintiff was that the person revendicating must possess an actual property in the goods seized unless they were given as a pledge or sold for cash. Nowhere is the doctrine laid down that the remedy given by the article is limited to the two cases given by the learned counsel.

Dalloz Verbo—Saisie revendication No. 6, says :

"Toutes les personnes qui ont intérêt à "la conservation de la chose ont le droit "d'agir par voie de saisie revendication" and amongst the many persons enumerated as entitled to the protection of this step, is mentioned the creditor of the proprietor. — Dalloz here is quoting the old commentator Pigeau with approval, and we think that if the creditor of the proprietor is entitled to use such an action, much more will a vendor, who alleges a fraud but for which he would have remained in possession of the goods, be entitled to the protection of this diligence of the law. If we even accept the doctrine of the learned counsel, we think that it may fairly be argued that a person who parts with goods upon the strength of a prior condition unfulfilled through fraud on the vendee's part, though he has indeed parted with possession on the goods, still retains sufficient *property* in them to enable him to take legal steps for preventing their disappearance untill his claim upon them is judicially determined.

For these reasons, the Court must decline to grant the nullity prayed for. Costs reserved.

SUPREME COURT

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SUCCESSION — LAST WILL AND TESTAMENT — NATURAL GRAND CHILDREN—HÉRITIERS RÉSERVATAIRES — ARTICLES 756, 759 AND 766 CODE CIVIL—ORDINANCE 21 OF 1883.

The natural children of a natural son of a "de cujus" asked, as "héritiers réservataires," for the nullity of the testament of the said "de cujus", or, at all events, that a legacy made under it should be reduced to the "quotité disponible."

The Defendant pleaded :

1o. *That a natural grandchild cannot by representation of his natural father or mother take a share in the succession of his natural grandfather or grandmother.*

2o. *That the word "descendants" in Art : 759 C. C. means "legitimate descendants" only, and that, in the words of Art* : 756 *C. C., "natural children are not heirs."*

Held by the Court :

1o. *That the principle contained in Art* : 756 *C. C. had been considerably modified, if not altogether set aside, by our local legislature.*

2o. *That the Ordinance had clearly intended to give rights of heirs to natural children, when they are not in competition with legitimate relatives of their ancestors.*

3o. *That it is presumable that the legislature thought it unnecessary, after enacting Section 6 of the Ordinance which establishes the rights of natural grandfathers and grandmothers upon the succession of their natural grandchildren, to enact a special clause as to the reciprocity of the rights of natural grandchildren upon the succession of their ancestors.*

4o. *That plaintiffs were entitled to a reserve in the succession of their natural grandmother.*

—

PINCRE,—Plaintiff.

and

PINCRE & ORS.,—Defendants.

—

Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

His Honor Andrew Mure,—Puisne Judge.

and

His Honor J. Rouillard,—Puisne Judge.

—

L. Chastellier,—Counsel for Plaintiff.

P. D. Chaperon,—Attorney for the same.

G. Guibert and W. Newton,—Counsel for Defendants.

G. Bouloux,—Attorney for the same.

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Record No. 24,363.

30*th. July* 1889.

The declaration in this case alleges that on the 4th. April 1886 Adolphe Pincre who was married to Lise Eléonore Perrette Martin died in the District of Plaines Wilhems leaving as sole heirs in virtue of Article 8 of Ordinance 21 of 1883, his natural mother Pulchérie Labutte, for one half, and his wife, for the other half of his succession; that the half accruing to the natural mother amounted in virtue of a deed of partition made by Notary Levieux, on the 27th. January 1888, to Rs. 9,065.42; that several years before the death of Adolphe Pincre, his natural mother Pulchérie Labutte was of unsound mind, deaf and blind and unable to manage her affairs; that Pulchérie Labutte died on 7th. March 1888 after having made a will instituting Widow Adolphe Pincre, one of the defendants, her universal legatee. The Plaintiff, Emile Edouard Pincre, and his sister, Antoinette Pincre, one of the co-defendants, are the only two natural acknowledged grandchildren of Pulchérie Labutte coming by representation of their natural father Jean Edouard Pincre, son of Pulchérie Labutte, and, as such, are entitled by law to inherit a share and portion in the succession of Pulchérie Labutte, being " héritiers réservataires " that the will of Pulchérie Labutte is null and void having been made when she was of unsound mind; that, besides, the legacy made to Widow Adolphe Pincre has been obtained by undue influence and by fraudulent manœuvres.

The declaration concludes in asking 1o. The nullity of the will or 2o. That the legacy made to Widow Adolphe Pincre be reduced to the " quotité disponible ".

The first plea of the principal defendant, Widow Adolphe Pincre, is to the effect that the Plaintiff and his sister have no right to any reserve in the succession of Pulchérie Labutte, and would not even have been entitled to claim the succession of Pulchérie Labutte, if she had died intestate, and therefore that the Plaintiff has no right to attack the will made by Pulchérie Labutte or the legacy contained in it in favor of the defendant or ask that the legacy be reduced.

It is upon the question of law raised by this first plea that the parties have been heard by the Court. It is not for the first time that the question of knowing whether

the natural grandchild of a natural child, deceased before his or her natural father or mother, is entitled to any share in the succession of his or her grandfather or mother, comes before this Court.

In 1866, (Piston's Report P. 139) in the case of L'Amiral & ors. vs. Pondart & wife, the Court said "any doubt which might "have been entertained hitherto on this "point, must be dismissed from our mind in "presence of the judgment of this Court in "the case of Virginie Bruneau vs. The "Government of Mauritius (Piston's Report "1864 P. 9 and foll:) affirmed as it has "been by Her Majesty in Her Privy Council "on the 18th. June 1866". Again, in the case of Hardouin & ors. vs. Frederic & ors. (1866 Piston's Report P. 140) the Court appears to have adopted the opinion that a natural grand child can, by representation of his or her natural father or mother, or in his or her own right, take a share in the succession of his or her natural grand father or mother on the authority of the case of Virginie Bruneau.

It was, however, argued for the defendant that the decisions do not appear to have been given after argument, and that the authority of Virginie Bruneau's case, upon which they are grounded, does not justify the conclusions arrived at by the Court in these decisions. The text invoked by the plaintiff is Article 759 of the Civil Code "En cas de prédécès de l'enfant naturel, ses "enfants ou descendants peuvent réclamer "les droits fixés par les articles précédents." It is contended for the plaintiff that the word "descendants" in this Article means "descendants naturels" as well as "descendants légitimes." The great majority of french commentators is against this theory, and also the case of Billard vs. Billard (Journal du Palais 1851 P. 261) to which the Privy Council referred in its judgment in Bruneau's case. It is true, as was observed by the learned counsel for the defendant that the Privy Council thought, looking to the decision in Billard vs. Billard and to the opinions of the commentators to which they had referred, it would not be right for them to suggest any doubt upon the meaning given to the word "descendants" in Article 759 by the majority of the french commentators — See page 171 of Piston's Reports 1866. But, at the same time, the Privy Council appears to have done so, because they considered that Artiele 759 and Article 766 referred to wholly different states of circumstances. It was about the same reason that led Chabot to hold that in Article 766 the word descendants meant "descendants naturels" as well as descendants "légitimes, parcequ'il ne s'agit pas "dans l'espèce, comme dans le cas prévu "par l'Article 759 d'un concours avec des "parents légitimes." Chabot did not certainly foresee a case like the present one in which there are no legitimate relatives in the family of the *de cujus*.

The argument based on Article 756 is the only serious one: "Les enfants naturels "ne sont point héritiers, la loi ne leur "accorde de droits sur les biens de leur "père ou mère décédés que lorsqu'ils ont "été légalement reconnus. Elle ne leur "accorde aucun droit sur les biens des "parents de leur père ou mère."

It was said for the defendant that the principle enacted in this Article had been given up by the legislator in Article 766, whereas it has been maintained in Article 759. They are both in Section 1st. of the Chapter "des successions irregulières" and Laurent and Demolombe are certainly consistent with themselves when they express the opinion that the word "descendants" in both Articles applies only to legitimate descendants.

So, we think that the Judges of this Court were also consistent with themselves when

after having declared in 1864 that descendants in Article 766 meant natural as well as legitimate descendants, they held in 1866 that the same word in Article 759 had the same meaning, when the natural grand children were not in presence of legitimate relatives.

But whatever doubt might have existed has, in our opinion, been removed by Ordinance 21 of 1883 which has done away, to a great extent, with the restrictions of Article 756. Section 3 of this Ordinance has amended Article 757 of the Civil Code by entitling natural children to the whole succession of their deceased mother, if she shall have left no legitimate descendants or ascendants. Article 758 is repealed by Section 4, and the natural child is entitled to the whole succession of his father if the latter leaves no legitimate descendants, ascendants, brothers, sisters, or legitimate descendants of such brothers or sisters. Section 5 enacts that in the case provided by the last phrase of Article 766 of the Civil Code, legal representation is allowed among the legitimate or acknowledged natural descendants of the natural brothers and sisters. Section 6 enacts that in the same case, if there be no acknowledged natural brothers or sisters or legitimate or acknowledged natural descendants of such brothers or sisters, the succession of the acknowledged natural child shall devolve upon the natural grand father and grandmother, or, failing them, upon the natural uncles and aunts. Section 7 repeals Articles 760, 761 and 908 of the Civil Code.

We have quoted these several sections of Ordinance 21 of 1883 to show that the principle contained in Article 756 of the Civil Code has been considerably modified, if not altogether set aside, by our local legistature. It is true that there is no special enactment in the new Ordinance upon the question at issue in this case, but it is to be presumed that in framing this Ordinance the legislature had before their eyes the decisions of this Court in the cases of L'Amiral vs. Pondart and of Hardouin vs. Frederic already quoted, and that they thought it unnecessary, after enacting Section 6 establishing the rights of natural grandfathers and grandmothers upon the succession of their natural grandchildren, to enact a special clause as to the rights of natural grandchildren upon the succession of their natural grandfathers and grandmothers when the latter have left no legitimate relatives.

In the present case, if Pulchérie Labutte had left grand nephews instead of grand children, it is clear that they would inherit, on the strength of the decision of the Privy Council in Bruneau's case, and yet it is argued that the grandchildren have no right, as heirs, on account of the principle laid down in Article 756. Such a consequence would constitute such a striking injustice, that we cannot suppose that the interpretation to be given to Ordinance 21 of 1883, because it is silent upon the meaning of the word "descendants" in Article 759, should be the one suggested by the defendant's counsel. This Ordinance has clearly intended to give rights of heirs to natural children when they are not in competition with legitimate relatives of their ascendants, and it would be against the spirit of its provisions to declare that it has given the preference to grand nephews over grand children, and that it has intended, when allowing rights to natural grandfathers upon the succession of their natural grandchildren to deny these latter the same rights by way of reciprocity upon the succession of their natural grandfathers.

We have to deal here with a family in which there are no legitimate relations, and we are of opinion that the plaintiff and his sister are entitled to invoke Article 759

as giving them rights in the succession of Pulchérie Labutte, their natural grand mother, by representation of their natural father, Jean Edmond Pincre, the natural son of Pulchérie Labutte ; coming by representation of their father under Article 759, they have a right to a reserve in the succesion of their grandmother.

SUPREME COURT

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BROKER—ABSENCE OF SECURITY—TRADER SUFFERING THROUGH SUCH ABSENCE — CHAMBRE DES COURTIERS — THEIR RESPONSIBILITY — ORD : 31 OF 1866 — ART : 1382 C. C. — LIABILITY OF THE CORPORATION OF BROKERS — ACTION OF THE PARQUET.

A trader having obtained a judgment against a broker and that judgment having remained unsatisfied through the broker not having furnished security as required by clauses 18 *&* 19 *of Ord :* 31 *of* 1866, *sued the members of the Committee of administration of the Chambers of Brokers under Art :* 1382 *C. C.*

The Court considered :

1o. *That under Ord :* 31 *of* 1866, *sect* 9, *it is for the Corporation of Brokers to institute legal proceedings for the infraction of Regulations.*

2o. *That the Committee of administration in the persons of its individual members is not responsible for the Corporation's sins of omission.*

Action dismissed with costs.

Quœre : Whether the practice of the Procureur General to call the attention of the Sydnic to the fact that a security has lapsed, is in accordance with Ordinance 31 *of* 1866.

—

KONNIEN & TOW-CHIN.,— Plaintiffs.

and

MONTOCCHIO & ORS.,—Defendants.

—

Before

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for Plaintiffs.
A. L'HOSTE,—Attorney for the same.

L. CHASTELLIER,—Counsel for Defendants.
E. GANACHAUD, — Attorney for the same.

Record No. 24,481.

1*st. August* 1889.

In this case, the plaintiffs obtained an unsatisfied judgment against one Myrtille, who had acted as a Sworn Broker since September eighteen hundred and seventy seven without furnishing the security prescribed by law, security without the provision of which, or its renewal, if lapse of time renders it necessary, no broker can lawfully act as such, under clauses 18 & 19 of Ordinance No. 31 of 1866.

The defendants are the committee of administration of the Chamber of Brokers, which committee, clause 3 of this same Ordinance constitutes, and which, it ordains, is to be elected annually by ballot. It is alleged that it was the duty of this committee to see that Myrtille did not exercise the functions of a broker without providing security, and that as they have failed in that duty, they have incurred to the plaintiffs the liability mentioned in Article 1383 of the Civil Code.

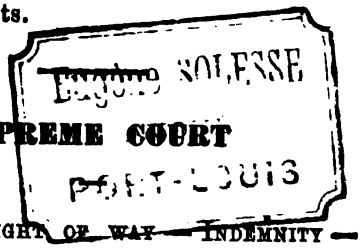
As our judgment turns entirely upon the question of the individual responsibility of the committee of administration as such,

when sued, as they are here sued, jointly and in solido, we do not think it necessary to enlarge upon the other points raised in this action, first as to whether the person who was a go-between Plaintiffs and Myrtille was in reality Myrtille's clerk or not, and, secondly, as to the very delicate point of the relative responsibilities of the Parquet and of the Corporation of Brokers constituted by Ordinance No. 31 of 1866, in the matter of the furnishing and the renewing of Broker's securities.

Upon the first point, we may perhaps, however, remark that we are little disposed to place reliance upon the statements of one who professing to be a qualified broker, appears, systematically, to have violated Article 11 of Ordinance No. 11 of 1836 which forbids a broker to lend his name for a negotiation to persons non commissioned, under a penalty of £150 sterling and on pain of dismissal. As to the second question, it is certain, as before stated, that a broker cannot lawfully exercise his function without furnishing and keeping up his securities. It is true that under the older of the two laws regulating the functions of brokers, Ordinance No. 11 of 1836, it was the duty of the "Chambre Syndicale" to make known to the public authority, i. e. to the Parquet, any infraction upon the part of a broker of the established laws and regulations. But the later Ordinance, No. 31 of 1866, which for the first time incorporated the Chamber of Brokers, rendering it liable thence forward to sue and be sued in its corporate capacity, by Article 9, left it to the Corporation to institute its own legal proceedings for the infraction of regulations. The practice in the matter of securities and of lapsed securities appears, however, to have been of late years (if we are to judge from specimens of correspondence between the Procureur General and the Syndic which find a place in the Record) for the Procureur General to call the attention of the Syndic to the fact that a security had lapsed and to seek the opinion of the Corporation as to the value either of first securities or renewed securities proferred by Brokers. Whether this practice is or is not on strict accordance with the law as embodied in Ordinance No. 31 of 1866 is, we repeat, a delicate question upon which we do not feel call upon here to express any opinion.

In the present action our view is that the committee of administration in the persons of its individual members is wrongly sued. A careful perusal of the clauses of Ordinance No. 31 of 1866 has failed to show us any authority for the doctrine that the office holders of the Corporation are to bear in their persons the burden of responsibility for the corporation's sins of omission, if sins of omission there be. Clause 9 declares it to be the duty not of the committee of administration but of the corporation (1o.) "to take care that all the members confine themselves within the legal limits of their calling and act in conformity with the laws and regulations in relation thereto" and (2o.) to exercise over the said members the supervision and authority of a disciplinary body." And again, it is the corporation, and not the committee of administration, which is empowered by Section 16 to appoint special committees of its body for instituting proceedings against offending members before Courts of Justice and for other kindred purposes. And there appears nothing cumbrous in the procedure necessary to set in motion the machinery of corporate action. The President or Vice President or any three members or the committee of administration, or any ten members of the general body of Brokers can, at any time (Section 6), cause a meeting of the corporation to be convened. Ten members present will form a quorum and the majority of members present and voting will decide any point raised (Section 4).

In view of these considerations, the Court finds that this action has been wrongly entered as against the present defendants, for whom there will consequently be judgment with costs.



SUPREME COURT

ENCLAVE — RIGHT OF WAY — INDEMNITY — EXPENSES—ROADS—EVIDENCE.

The plaintiffs claimed a right of way through defendants' property, as their lands were enclosed on all sides (enclavés).

The defendants pleaded "inter alia":

1o. *That there was no enclave here, in as much as plaintiffs could by means of a private road on their own lands, obtain egress to a public highway.*

2o. *That that private road, thought expensive, would cost less than the indemnity plaintiffs would have to pay them, on account of the right of passage on their property.*

By the Court:

1o. *Mere difficulties of egress are not sufficient to constitute an "enclave".*

2o. *Though there be no absolute impossibility of egress, still, if the cost of road-making be excessive, there would be "enclave".*

3o. *With regard to some of the plots of ground in question here, as the making of a road to connect them with the public highway would cost a large sum of money or would be beset with serious difficulties, they should be considered as enclaves.*

4o. *With regard to the remainder, the Court considered that further evidence should be be produced by the defendants as to the quantum of indemnity they could legitimately claim for a right of way on their property.*

—

ULCOQ & ANOR.,—Plaintiff.

and

THE MAURITIUS SUGAR ESTATES Cy.,—Defendants.

—

Before

His Honor Sir E. J. LECLÉZIO, Kt.,—Chief Judge.

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

W. NEWTON,—Counsel for Plaintiffs.
H. LECLÉZIO,—Attorney for the same.

Messrs. GUIBERT & CHASTELLIER,—Counsel for Defendants.

E. DUVIVIER,—Attorney for the same.

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Record No. 23,711.

17*th. August* 1889.

The plaintiffs are the owners of the Estate *Rivière du Bois* composed of the concessions Dufoy de la Branchère, Merven and Agapit Laverdure—Agapit is of 156 arpents according to the title deeds, and of 185½ according to a memorandum of land surveyor Maillard, of the 15th December 1883, and is bounded towards the north and the east, by the right bank of Grand River S. E., towards the south, by concession Pinal and Léguillon, depending from the Estate *L'Etoile,* and towards the west, by the land Merven belonging to the Plaintiffs.

The declaration alleges, 1o. That the terrain Agapit Laverdure is enclosed (enclavé) within Grand River S. E. which separates it from concession Bardet, depending from *L'Étoile* estate, the range of Grand River mountain which separates it from concession Merven and the concession Pinal and

Léguillon depending from the estate *L'Étoile*, 2o. That there is no possible egress from the land Agapit Laverdure, except through *L'Étoile* and that the Plaintiffs are by law entitled to ask and obtain from the defendants a passage through their estate *L'Étoile*; as a consequence, the Plaintiffs ask the Court to decree, 1o. That Agapit is "enclavé" within Grand River S. E., the range of Grand River Mountains and the concession Pinal and Léguillon, 2o. That the only egress through Agapit is through the defendants' estate *L'Étoile*, 3o. That the plaintiffs are entitled to a passage through defendants' estate *L'Étoile*, to work Agapit, upon payment of an indemnity which will be proportionate to the damage that may be caused to the defendants by the establishment of that passage, 4o. That the defendants are bound to allow the plaintiffs to pass through *L'Étoile*, upon payment of such an indemnity.

The plea denies that Agapit is "enclavé", as alleged in the declaration, and that there is no possible egress from it except through *L'Étoile*.

We had before us several plans and three Reports of Land Surveyors who were also examined in Court as witnesses, together with other persons more or less competent to give an opinion on the points at issue—besides, the Judges themselves considered it necessary, on account of the conflicting evidence which had been led, to make a personal inspection of the locality.

From Maillard's Report of the 7th. October 1886 and from his plan, it appears that Agapit is crossed from the south-west to the north east by extremity of the range of Grand River Mountains which ends on the right bank of Grand River S.E. A short spur starts from the crest in an eastern direction and divides the southern portion of Agapit into two parts, the larger portion of which, nearer the river, has been called A. and measures about 100 arpents, and the smaller has been called B. and measures 37 arpents; the north part of Agapit has been called C. and measures about 48 arpents. Portions A and B (the south eastern part of Agapit) are at the extremity of Valley called "Le Grand Fond" which is a dependency of *L'Étoile* estate; portion C, the north part of Agapit may be considered in some parts of its length, according to the expression employed by Land Surveyor Lepervanche, as the "rempart d'encaissement" (the high and steep bank) of Grand River S. E. It results, however, from the evidence that portion C of Agapit is well wooded and that the timber on portion C after the ordinary river reserves have been set apart may be cut down as well as the timber on the other portions of Agapit.

It was even said that there are no Mountain Reserves on Agapit on account of the base fixed by the Ordinance for the range of Mountains to which Agapit belongs.

Part A is, according to all the witnesses, the most valuable; the soil on the flat portion of A is said to be very good. Part B is less valuable than A, and C has little value, except for the timber upon it.

Lepervanche in his Report of the 20th August 1887, values A—Rs. 32,000, B—Rs. 12,000 and C—only Rs. 7,500, but he adds that this valuation is merely nominal, no profit being possible in the state in which the land is now, that is, without roads. Langlois in his Report of the 20th July 1887 values Agapit in the state in which he found the property as follows:

A—Rs. 17,000, B—Rs. 5,500, and C—Rs. 7,200, none of these portions have been worked, and, except on a small part of C which is nearer Merven, no wood appears to have been cut down; the land is pretty well wooded almost everywhere such being the land for which a passage is claimed through the estate *L'Étoile*, we have to examine

whether it is "enclavé", according to our Civil Law, in such a manner as to entitle the plaintiffs to compel the defendants to give them a passage through the valley "Le Grand Fond", which is the defendants' property, up to the Public road of Trois Ilots. The plaintiffs say that to connect A and B with the remainder of their estate *Rivière du Bois* it would be necessary to make a road through A and C on Agapit and through that part of terrain Merven which is on the right bank of the river called Rivière du Bois, a tributary of Grand River S. E. and which is almost as hilly as part C of Agapit; that such a road would be very expensive, would cost a sum of money out of proportion with the value of Agapit and would be almost impracticable on C on account of its gradient. On the other hand, the defendants here led evidence with the object of showing that the plaintiffs' averment in their declaration that Agapit is separated from terrain Merven by the range of Grand River Mountains is incorrect, that they had much exaggerated the cost of the road through C, that other tracks than the one proposed by Maillard and Lepervanche may be followed to avoid a steep gradient, and that the plaintiffs were wrong when they took into account the road to be made through Merven without at the same time considering the greater value which Merven would derive from the construction of a road upon that part of the plaintiffs' estate, a road which would lead to the one existing on Dufoy de la Branchère and to the Public road of Cent Gaulettes. It was further stated by the defendants, that the road proposed by Maillard on that part of Merven which is on the right bank of the River du Bois would not be the easier to be made and that it would be preferable to cross the river "du Bois" soon after having left Agapit. The defendants have also called the attention of the Court to the indemnity which the Plaintiffs would have to pay them on account of the prejudice caused to *L'Étoile* if a right of passage were to be allowed to the plaintiffs, and the defendants said that the indemnity would be, at least, equal to the expenses which the plaintiffs would incur in the construction of a road through Agapit to the other parts of their estate *Rivière du Bois*, and that, in such circumstances, the Court should refuse the right of passage asked for.

The law which we have to apply is Article 682 of the Civil Code. Laurent Vol: 9, Page 106, says "on peut admettre que des "difficultés ne suffisent pas pour qu'il y ait "enclave... Par contre si les dépenses qu'il "faudrait faire pour rendre un chemin viable "étaient excessives, il y aurait enclave "quoiqu'il n'y eut pas impossibilité absolue... "Dès que les frais qu'il faudrait faire sont "tout à fait hors de proportion avec la valeur "de l'héritage, il y a enclave. La difficulté "se résout donc en un calcul de dépenses. "Si les travaux sont faciles et peu dispen- "dieux il n'y a pas d'enclave. Quand donc "les frais excédent de peu de chose l'in- "demnité que le propriétaire enclavé "devrait payer pour obtenir un passage sur "les fonds voisins, le principe de conciliation "qui domine en cette matière demande que "le propriétaire enclavé supporte cette légère "dépense plutôt que de faire peser sur les "voisins une servitude de passage toujours "onéreuse."

We have weighed with care the evidence given on both sides with regard to the possibility and to the cost of a road through C. and we have come the conclusion that although Agapit is not separated from terrain Merven by the range of Grand River Mountains, as alleged in the declaration, a good cart road through A and C to connect A and C with the terrain Merven is beset with serious difficulties and would cost a very large sum of money.

We further hold that in order to work B by the Chemin du Grand Fond or to connect it with A in order to work it through C and terrain Merven, it is absolutely necessary to pass on lands belonging to *L'Étoile*. Besides, such a road or any other road through C, on account of the precipitons slopes on some parts of C, would necessitate, during the heavy rains, frequent and expensive repairs.

The steep gradient objected to by Maillard and Lepervanche might probably be reduced by lengthening the road, but then the cost of the road would be still greater. As for the roads proposed by Langlois and De La Hogue in the upper parts of A and C, they appear to us to be impracticable for the purposes of working Agapit. The evidence of Maillard and Lepervanche, although containing some exaggerations, give, in a general way, a good idea of the difficulties that are to be met with on C, and although there may not be an absolute impossibility of making a road there, we think that, even without taking into account the road which it would be necessary to make through Merven to reach the existing road on Dufoy de la Branchère, the expenses for constructing and keeping a road on C in good condition would be so great, that the plaintiffs may be entitled to say that A and B are "enclavés" unless it is shown that the indemnity to be paid to the defendants by the plaintiffs for working A and B by the Chemin du Grand Fonds will be of such an amount as to lead us to declare that the plaintiffs must give up their pretention to have an exist through *L'Étoile*. The plaintiffs have included in their calculation of the cost of a road connecting Agapit with the Cent Gaulettes Public Road, the cost of the road to be constructed across Merven, but we are of opinion that the costs of a road to be made through Merven should not be taken into account for the purpose of examining the question at issue between the parties. Merven is 320 acres in extent, the greater part of which is a fine plateau, its soil is generally good, and parts of it are still well wooded. A good road through it would much increase its value. With regard to C itself, we are of opinion that a road to work it through A would be nearly as expensive as the one which would be made to work A through C by Merven; the part of C nearer A is the most precipitous part, and we think that Maillard gave good advice to the plaintiffs when he wrote in his report —"dans l'hypothèse de sortir par *L'Etoile*, la partie marquée C serait mise de côté comme exploitation regulière. Ce qui serait préférable au point de vue des intérêts des propriétaires d'Agapit."

We will go further than Maillard and say that we do not think that the plaintiffs are entitled to any "sortie" at all by *L'Etoile* for portion C. This portion has been valued by Lepervenche Rs. 7,500 and the road to be made upon it for working it would certainly cost much more than the double of that sum; besides C does not form part by its topography of the Valley of Grand Fonds as A and B; it may in reality be considered as the prolongation of the southern part of Terrain Merven which belongs to the valley of Rivière du Bois. Wood appears to have been cut down already here and then on that part of C which is near Merven, and if any portion of it were to be worked, it is that portion which is near Merven; the portion near A is too steep to be over cultivated. For these reasons, we consider that C should not be entitled to a right of passage on *L'Etoile*, and that parts A and B alone would, subject to the reservation already made, be entitled to such right.

We have now to examine where the right of passage, if granted, should be exercised on *L'Étoile*. There was some evidence led as to a passage from A accross Grand River S.E

through Terrain Bardet, but parties seem to agree that if a right of passage were granted by the Court through *L'Étoile*, it should be exercised on the Chemin du Grand Fonds, which would be a proper exit for A. For B it would be necessary to make a road leading from it through Pinal and Léguillon also to the Chemin du Grand Fonds; but this road which has been made only for the wants of *L'Étoile*, is not wide enough for the purposes to which it would serve; it should be widened by several feet nearly in all its length; besides the wire ropes of *L'Étoile* would have to be altered in certain places, some bridges along the road may have to be widened; arrangements would have to be made by the plaintiffs with the defendants for the keeping of the road in good condition. There is no doubt that a servitude like that of passage for upwards of a mile through a Sugar Estate causes prejudice, so that the plaintiffs would have to pay an indemnity to the defendants for that prejudice as well as for the right of using the road already made, for its widening, the loss of canes and the other matters connected with this right of passage. In ordinary cases, the question of "enclave" may be settled by the Court before the question of indemnity is finally determined, but in this case on account of the special facts just mentioned, we are of opinion that before the Court can declare the portions A and B to be "enclaves" we must know exactly what will be the amount of indemnity due to *L'Étoile*. Referring to the principles contained in the passage of Laurent quoted above, we think that we have not sufficient data upon which we can base the indemnity which may have to be paid to *L'Étoile* for this servitude. The evidence which has been given incidentally upon this matter, does not enable us to declare in a final manner that such indemnity would be much less than or nearly equal to the cost of construction and maintenance of the road to be made through A and C to Merven. We must before giving a final judgment upon the question of "enclave", with regard to portions A and B of Agapit, have before us the amount claimed by the defendants for an indemnity, and further evidence upon that question of that amount if disputed by the plaintiffs. We, therefore, order the defendants to serve upon the plaintiffs within a delay of 14 days from this day, full particulars of the indemnity claimed by them for the right of passage which may be allowed to portions A and B of Agapit on the Chemin du Grand Fonds, and a similar delay to the plaintiffs to answer the defendants notice—if parties do not agree upon the amount of the indemnity, the defendants will have to make proof of the indemnity claimed by them.

Costs reserved.

SUPREME COURT

MORTGAGE—MOVEABLE—ARTICLE 2105 C. C.—PRIVILIGE—FUNERAL EXPENSES—FRAIS DE DERNIÈRE MALADIE—PROVISONAL COLLOCATIONS—COSTS.

The Master collocated definitely and by preference a funeral undertaker and several medical practitioners for funeral expenses and "frais de dernière maladie" on an immoveable property of a "de cujus."

The mortgage creditor appealed on the ground that the "de cujus" had left sufficient moveables to pay the above claims.

By the Court:

1o. *Under Article* 2105 *C. C., the privilege for the above claims can be exercised on immoveable property, only when the moveable property is insufficient.*

2o. *That the collocations aforesaid should have been only provisional, allowing those creditors a sufficient delay to enforce pay-*

ment of their respective claims out of the "mobilier."

3o. *The case must be remitted to the Master in order that the question of the existence of the "mobilier" of the "de cujus" be more fully examined.*

4o. *The onus of proving the existence of the "mobilier" lies on the appellant.*

5o. *The Master is the competent authority to decide whether there had been any fault on the part of Respondents in not exercising their rights upon the "mobilier."*

—

JOLLIVET,—Appellant.

and

LAURENT & ORS.,—Respondents.

—

Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

L. CHASTELLIER, — Counsel for Appellant.
E. CHAILLET,—Attorney for the same.

O. LAURENT,—Counsel for Respondents.
A. ROHAN & ORS.,—Attorney for the same.

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Record No. 24,826.

21*st. August* 1889.

Mrs. Poncin died on 27th. November 1888, after a long illness. Subsequently to her death, a house owned by her in the Town of Port Louis was consumed by fire, and on the 12th. June 1889, an attribution of price for the amount paid by the Insurance Company, namely Rs. 4,000 was made by the Master of the Supreme Court.

In the attribution of price, Mr. Polixène George, who filed an account of Rs. 196 for funeral expenses, and several medical practitioners who had lodged claims amounting in the aggregate to Rs. 484, for attendance on Mrs. Poncin during the last illness, were collocated in preference to Mr. Jollivet, an inscribed mortgage creditor on the house which was burnt down.

Against the attribution of price, in so far as it related to Mr. Polixène George and the medical practitioners, an appeal was lodged by Mr. Jollivet.

The grounds of appeal are numerous. Some of them can be summarily disposed of. Referring to the 1st., 2nd., 3rd., 4th., 5th., and 9th. grounds of appeal, the Court is quite satisfied that so far as the medical practitioners are concerned, their claims were incurred for the last illness of Mrs. Poncin and that the Master was right in admitting their bills, approved by Mrs. Poncin, as evidence of the medical care bestowed on the late Mrs. Poncin. It was urged in Court that these claims were excessive, but this objection does not appear amongst the grounds of appeal and cannot be entertained by the Court. As for the claim preferred by Mr. Polixène George, for which a judgment of the District Court had been obtained, it was objected to as excessive, but the objection was not much pressed, and it related only to a few items of that bill. It was probably supposed, at the time of the death of Mrs. Poncin, that she was a wealthier person than was shown by subsequent events. But the expenses appear to have been incurred "bonâ fide", and we think that the Master exercised his discretion rightly in overruling that objection.

In the 6th., 7th., 8th., 10th. and 11th. grounds of appeal, the appellant criticises the application made by the Master, of Article 2105 of the Civil Code.

That Article confers on claims for funeral

expenses, medical attendance during the last illness (frais de la dernière maladie), a privilege both on moveable and immoveable property ; but by virtue of the same Article, the privilege can only be exercised on immoveable property, when the moveable proporty is insufficient (à défaut de mobilier).

It is here alleged that the Master acted wrongly in collocating the claims of the medical practitioners and of Mr. Polixène Georges for funeral expenses, in as much as they had not exercised their alleged rights against the moveables of the estate of Mrs. Poncin *within the delay prescribed by law*. What that delay is, the appellant did not attempt to define, but the Court assumes the contention of the appellant to be that the respondents ought to have exercised their privilege on the moveable property left by Mrs. Poncin before producing their claims for collocation in the attribution of price of the immoveable property. In one of the grounds of appeal, we find it stated that Widow Poncin at the time of her death was possessed of furniture valued at Rs. 1,071 : this assertion is no doubt founded on a document, dated 21st. May 1889 signed by Poncin, husband of the deceased lady, in which Poncin declares that the deceased left furniture, of which a list is given, and which he values at the figure above stated.

The mode of procedure before the Master in matters of attribution of price is so summary and informal, that nothing was found relative to that subject, in the scanty record of proceedings sent to the Court, but there cannot be any doubt that the question of the moveable property left by the deceased was raised before the Master, and that some information was given as to the "mobilier" existing at the time of Mrs. Poncin's death, nothing shows why this furniture was left out of consideration by the Master.

As matters stand before us, we are of opinion that the proper mode of proceeding which the Master ought to have followed is that indicated by Dalloz, Pont, and others and which appears to have been generally adopted by the French Courts.

The Master instead of collocating Mr. Polixène Georges and the medical practitioners definitively, should have made a provisional collocation of their claims, allowing these creditors a sufficient delay to enable them to enforce payment of their respective claim out of the "mobilier."

The same rule was laid down by the Court in the recent case of Pétricher vs. Lewison. In that case, the claim of a medical practitioner for "frais de dernière maladie" was in conflict with that of a creditor holding a mortgage, and it was shown before the Master that the deceased had left some moveable property.

The claim of the medical practitioner was not allowed by the Master, but it was ruled on appeal that there having been no fault on the part of the medical practitioner for not having enforced his claim on the moveable estate of the deceased, the Master ought to have made a provisional collocation of the claim of the medical practitioner and given him a delay to make good his claim on the moveable estate. The ruling of the Court must be the same in this instance.

The case is, therefore, remitted to the Master in order that the question of the existence of the "mobilier" at the time of the death of Mrs. Poncin should be more fully examined and to enable the interested parties to enforce their claims on the moveable property, if any, of the late Mrs. Poncin.

It must be remarked that the judgment of the Court proceeds on the ground that the late Mrs. Poncin may have been possessed of moveable property at the time of her death, as alleged by the appellant ; but as this is denied by the respondents, it is for

the appellant to prove the existence of such moveable property at the time of Mrs. Poncin's death. In the event of the respondents not being able to realise their claims out of the "mobilier" if any existed, a question may arise whether there has not been any fault on the part of the respondents in not exercising their rights on the "mobilier" in due time, and whether they are not to bear the consequences of having allowed it to disappear.

Should any such questions arise, the Master is the proper authority for deciding them in the first instance.

Under the circumstances, we are of opinion that each party should pay his own costs in the present appeal.

SUPREME COURT

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APPEAL FROM DECISION OF DISTRICT COURT—COLLECTIONS OF MONEYS—BOND—SURETY—PRIVATE WRITING—AMOUNT OF LIABILITY OF SURETY—ARTICLES 1326 C. C.—JUDGMENT REVERSED.

A collecting clerk signed "Vu exact" a detailed account of certain receipt moneys, the amount of which the clerk acknowledged having received and not accounted for to the Company.

The surety of the said clerk having been sued for the total amount of the above account, the Court held, on appeal from the decision of the District Court:

1o. *That the surety was liable, though he had affixed on the bond the word "approuvé" only, without mentioning the amount of the liability as contained in the body of the bond.*

2o. *That the surety was, however, liable (under the particular circumstances of this case) not for the whole amount of the account, but only for the sums which the clerk had really received and not accounted for.*

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SOCIÉTÉ DE L'ENGRAIS MAURICIEN, — Appellants.

and

MAURICE,—Respondent.

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Before

His Honor Sir E. J. LECLÉZIO, KT.,—Chief Judge.

and

His Honor F. C. WILLIAMS.,—Puisne Judge.

—

P. L. CHASTELLIER,—Counsel for Appellants.

G. RITTER,—Attorney for the same.

V. DELAFAYE,—Counsel for Respondent.

G. BOULOUX,—Attorney for the same.

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Record No. 924.

2nd. September 1889.

In the Court below, the defendant was sued upon a security bond for Rs. 1000 (one thousand rupees) which he had signed in favor of the plaintiff on the 10th. day of December eighteen hundred and eighty five.

It was a guarantee to the Society against any losses accruing to them by the failure of a certain Garraud, one of their collecting clerks, to render up an account of moneys received on their behalf "d'après les états fournis par le Directeur de la Compagnie." Garraud, who has since died, became a defaulter to the *Engrais Mauricien* in eighteen hundred and eighty seven, and he signed on the twenty first day of October eighteen hundred and eighty seven, as "Vu exact", a detailed account prepared by the manager

with his assistance of receipts moneys "remis à M. Ernest Garraud pour être recouvrés, dont il a touché le montant et dont il n'a pas tenu compte à la Société." The evidence of a fellow clerk, Sandaps, however, is that being asked by him, how he could have signed a document showing such a large deficit against him, be answered that there was no real deficit, that most of the parties mentioned in the document had either died or changed residence, and that he had been made to sign the document with the expectation that he might be re-instated.

It is indeed hard to understand how Garraud should in his sober senses have furnished such incriminating evidence against himself, unless, at all events, relieved from the fear of a criminal prosecution.

We do not feel entirely satisfied that Garraud really considered document B as exact in the sense of its heading. The fact that some of the sums placed against the client's names in it are followed by such remarks in pencil as "quitté" and "mort" lend colour to the view that the document is a record rather of sums owing, for which Garraud was responsible as collector, than of sums which he or his sub-collectors had actually received in cash.

The sub-manager, M. de Pitray, says that he went round with Garraud twice to all the parties mentioned in list B, first to compile that list and once again after this action was entered, in order, he says, to ascertain whether some of these people might still be debtors of the Company. This would tend to show that he had doubts as to the value of the declaration made to him by Garraud who appear to have been a very careless and indifferent person who should have been more closely watched by the Company.

The result of the second visit is embodied in the unsigned document C. Document B showed Rs. 907.50 as received by Garraud for the Company and not accounted for; but according to document C, the customers of the Company, from whom Garraud was alleged to have received the money embezzled, could only produce receipts from him to the amount of Rs. 147.50, one hundred and forty seven rupees and fifty cents.

As regards defendant's obligation to the Company under the security bond A, there is no doubt that it should have been signed by him not only as "approuvé" under Article 1326 of the Civil Code, but as "approuvé" for the sum mentioned in the bond. But if we are to look outside that bond for further evidence as to the nature and extent of defendant's obligation, and if in fact we are to regard it (as the Magistrate did) only as a "commencement de preuve par écrit" we still find it impossible to believe that defendant could have affixed his signature to this document without seeing the words "mille roupies" in large letters which directly preceded it.

He says, on personal answers, that he signed the document without reading it—an assertion strongly inconsistent with his subsequent statement on oath that he had signed "after considering all the points involved" —that he did not act without reflexion" and "that he bound himself after due consideration only." His defence is that he believed himself liable to the extent of five hundred rupees only, and that he entered into the security upon an understanding that the Company's claims against clients were all paid in advance (though his own payments as a client do not appear to have been advance payments) and that a stricter check was kept by the Society upon their collectors than now appears to have been kept, at least in Garraud's case.

We cannot regard these indefinite considerations as limiting the liability to which the defendant committed himself by signing document A, as Garraud's security. It may possibly be, as he himself says, that he and

Garraud were on such good terms and he had such confidence in Garraud that he signed the document without reading it. If so, the defendant must pay the penalty of his own great neglect. We are satisfied that he knew the nature of the document, and of the amount "mille roupies" which it bore conspicuously on its face as the limit of his liability.

Under all the circumstances to which we have alluded, however, we cannot regard the defendant's liability to extend to any claims which the Society may choose to make as their losses through Garraud's default, unsupported by any other evidence than that of document B.

The Sub manager declares that he visited all the clients mentioned in that document and that they produced to him receipts from Garraud, covering their obligations as recorded in the document, to the extent of one hundred and forty seven rupees and fifty cents only.

This seems to us to afford a fairer test of the actual sums received and misappropriated by the deceased Garraud than the document B itself, although it purports to be signed by him.

The Magistrate's judgment is set aside and judgment is to be entered for the plaintiffs for one hundred and forty seven rupees and 50 cents, with costs.

SUPREME COURT

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REAL TENDERS—VALIDITY—ARTICLE 815 C. P. C.—REFÉRÉ — JUDGE AT CHAMBERS — JURISDICTION — SUPREME COURT JURISDICTION.

A debtor having made a tender of moneys, applied for the validity of the same to the Judge at Chambers, who, being in doubt about the competency of that course, referred the matter to the Supreme Court.

Held by the Court:

1o. *That in the absence of any rule of Court directing that the application for the validity of real tenders should be made to the Judge at Chambers, the matter is more properly within the competency of the Supreme Court.*

2o. *That matters which, according to French jurisprudence, are to be taken before the President "en référé" are matters of urgency, and that that reason could not be alleged here for the application to the Judge at Chambers.*

3o. *That the Judge having referred the matter to the Supreme Court, the more practical way of dealing with the case was to consider the application as made to the Court and to retain possession of it.*

The real tenders were validated and each party was condemned to pay his own costs.

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BAPTISTE,—Plaintiff.

and

NAIRAC, — Defendant.

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Before

His Honor ANDREW MURE,—Puisne Judge.

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

V. DELAFAYE,—Counsel for the Plaintiff.
A. ROHAN,—Attorney for the same.

J. JOLLIVET,—Counsel for the Defendant.
H. THATCHER,—Attorney for the same.

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Record Nos. 24,687, 24,704, 24,755, 24,774, 24,813, 24,841, 24,870.

12*th. September* 1889.

These are cases in which Nairac, the creditor under a "Bon" for sixteen hundred

Rupees payable by monthly instalments of one hundred and sixty Rupees, objects to the validity of the procedure adopted by Baptiste the debtor's co-cautioner, who on the offer of payment being refused called on his opponent before the Judge in Chambers to show cause why the real tenders should not be validated. The objection of the creditor was not to the sufficiency of the tenders, but merely to the form of procedure.

The Judge in chambers in each case of tender referred the application for the validity of the tenders to the Court to be taken at the same time as the main action of Nairac versus Hodgson and Baptiste.

That action was raised against the principal debtor Hodgson and his surety Baptiste on the ground that Hodgson had lost the "bénéfice du terme" by the mere fact of his selling off his household furniture and obtaining leave of absence from the colony on account of the state of his health. The Court had no hesitation in finding that these facts were not sufficient proof of the "déconfiture" of Hodgson, and that he had not lost the "bénéfice du terme."

We have also held that these real tenders were incidental to the principal action before mentioned. By Article 815 of the Code of Procedure, it is enacted that "La demande "qui pourra être intentée soit en validité soit "en nullité des offres ou de la consignation "sera formée d'après les règles établies pour "les demandes principales. Si elle est in-"cidente elle sera par requête". — It is admitted that the word "requête" has nothing to do with the words "requête civile.". The latter procedure refers to an extraordinary remedy given in certain cases to litigants or their heirs to call in question the judgment of a Court before the same judges who have given it. A third party had the remedy of "Tierce opposition" but that not being open to the parties themselves, the system of "requête civile" was established for their benefit. Article 79 of our Rules of Court which directs that application for "requête civile et tierce opposition" shall be made to the Court summarily in a notice with summons, does not seem to be a rule which applies to the present matter.

It has, however, been probably supposed to do so and hence has arisen the objection in the present case, and also the fact that several cases of the validity of real tenders have been quoted to us in which the procedure referred to was adopted, but these were cases not contested, and consequently of no authority to decide the present question.

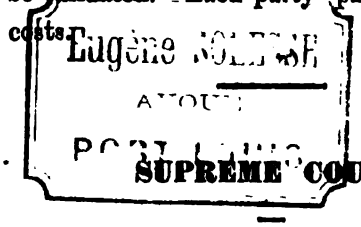
In France, there seems to be a varying procedure both by an application to the full tribunal, and to the President of the tribunal of First instance. Carré and Chauveau in their treatise on procedure Vol. 6th. Part II, in their commentary on Article 815 Code of Procedure 2. 2491 say: "Si la de-"mande est incidente, elle est formée, non "par exploit comme la demande principale, "mais par une requête signifiée d'avoué "à avoué." Almost all the theoretical writers on the "Code de Procedure" speak of this matter in the same terms. Hence, it is clear that the procedure in France is not in a case incidental to a principal action by the service of a writ and the raising of an action before the ordinary Tribunals, but something else. De Belleyme, who was a President of the Tribunal of First instance of the Department of the Seine in his treatise entitled "Ordonnances sur Requêtes et sur référés" in treating of "offres réelles" (Vol. II p. p. 25 and 26, 3rd. edition) gives many instances in which the validity of the "offres réelles" are dealt with by the President of the Tribunal of First instance, and where there is a pursuit and the question of real tenders arises with reference to that pursuit, he seems to recognise no other tribunal than the President of the Court of First Instance. Of course, in that event, an application to the Judge in Chambers is here

the correct course. It is true that Dalloz Verbo Obligations No. 2,066 and Verbo Référé No. 204 and 205 takes an opposite view.

In the latter passage, he admits de Belleyne's cases to have been decided as the latter states, and Dalloz proceeds to argue against that view. In this diversity of practice, the Court is inclined to think that in the absence of any rule of Court directing that the application for the validity of real tenders should be made to the Judge in Chambers, the matter is more properly within the competency of the Supreme Court. Our main reason for so deciding is that, as a general rule, matters which according to French jurisprudence are to be taken before the President "en référé" are matters of urgency, and that reason cannot be alleged here for having applied to the Judge in Chambers.

In this case, however, the Judge in Chambers did not declare himself competent, and did not assume the jurisdiction which he did not possess. Being in doubt, he referred the matter to the Supreme Court, and the more practical way of dealing with this case is to consider the application as made to the Court and to retain possession of it.

There being no other objection to Hodgson's application but the present, which is one of mere technical form of procedure, the order of the Court is that the real tenders should be ~~validated. Each party~~ paying his own costs.



APPEAL FROM DECISION OF VICE-CONSUL OF MADAGASCAR—JUDGMENT DEBT—NOVATION—INTENTION OF PARTIES—NEW AGREEMENT—FRENCH AND ENGLISH LAW—DECISION REVERSED.

A creditor having obtained a judgment against his debtor before the Consular Court of Madagascar, a few months after, a new arrangement was entered into between the parties.

Under the new agreement, a new account current was opened between the parties, and most of the items of the old account, for the balance of which judgment had been obtained, were inserted in the new account.

Held by the majority of the Judges of the Supreme Court, on appeal from the decision of the Vice Consul:

1o. *That, both under the French and the English law (which latter law is to be followed at Madagascar) a judgment is a contract of record which may be set aside by the common consent of parties, provided their intention clearly results from their deeds or from their acts.*

2o. *That is not necessary that that intention should be expressed in words; that it may be implied, provided the intention of parties clearly appears from the context of the new agreement and from the new facts which follow it.*

3o. *That the best test in such matters is the inconsistency or incompatibility of the co-existence of the old contract with the new contract.*

4o. *That the circumstances here clearly indicated that a "novation" of the debt had been intended by the parties.*

The judgment of the Vice Consul was set aside with costs.

One of the Judges, however, was of opinion that the intention of the creditor to abandon the judgment obtained by him had not been clearly and conclusively made out.

MAINGARD,—Appellant.

and

PÉLICIER FRÈRES,—Respondents.

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Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

His Honor F. C. Williams,—Puisne Judge.

and

His Honor J. Rouillard,—Puisne Judge.

—

Messrs. G. Guibert and Y. Jollivet,—Counsel for Appellant.

L. de St. Pern,—Attorney for the same.

P.L.Chastellier,—Counsel for Respondents.
Rolando,—Attorney for the same.

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Record No. 916.

19*th. September* 1889.

Judgment

Delivered by His Honor The Chief Judge

and

His Honor Mr. Justice Williams.

This is an appeal from a judgment of H. B. M. Vice Consular Court at Madagascar, dated 5th. October 1888, refusing to declare the nullity of the seizure of appellant's property made before the Consular Court in March 1887 in satisfaction of a judgment against appellant given by the Consul on the 24th. June 1885.

That judgment went against the appellant for a sum of $320.44c. which he admitted to be balance of an account due by him to the Respondents, one of the appellant's contentions now is that, after it was taken and previous to the execution under it, there was novation in respect of the judgment debt, that it had been set aside by mutual consent and that the respondents had no right te execute the judgment.

We may say at once that this contention appears to us, upon the evidence, to be well founded. The amount for which judgment was given against the appellant on the 24th. June 1885, was for a fixed sum $320.44 c. the balance of an account. About three months later, and before any attempt was made to recover from the appellant upon the judgment, a new arrangement was entered into between the respondents and himself by deed of 10th. September 1885, the preamble of which runs as follows: "1o. Pour l'in-"telligence des faits, les parties jugent utiles "d'établir.— Que M. A. Maingard est débi-"teur de l'établissement "Providence" d'une "somme de $400 en vertu d'un jugement "arbitral rendu à Tamatave en Juin dernier. "2o. Que Providence par le même juge-"ment a été condamné à passer à son usine "pour être converties en sucres les repousses "des cannes d'Euréka (se référer au juge-"ment). 3o. Que M: Maingard est aussi "débiteur de MM. Pélicier Frères d'une "somme de trois à quatre cents piastres "(cette dette ne pourra être établie d'une "manière exacte qu'à la réception des "comptes de retour d'une expédition de "sucre faite par MM. Pélicier Frères pour "compte de M. Maingard). 4o. Que les "propriétés de M. Maingard situées sur la "rivière de "Chandramanongy" et connues "sous les noms d'Euréka et d'Eden sont la "garantie des dits créanciers par privilège "sur toute autre créance, tant dans leur "valeur foncière que dans ce qu'elles peuvent "produire jusqu'à libération complète; dans "le but de se faciliter mutuellement dans "l'exécution des charges ci-dessus, les "parties font les conventions suivantes." Here follow several clauses about the crushing of the canes of Maingard by Pélicier, the selling of a still and of syrup to Maingard by Pélicier, of the property "Eden" by Maingard to Pélicier, the opening of a new

credit of $400 by Pélicier to Maingard and several other matters.

In virtue of this new agreement of the 10th. Sepfember 1885, a new account current is opened between parties (doct. K.) and we see that the items of the old account (doct. T. 6) for the balance of which judgment had been taken on 24th. June 1885 are inserted in the new account, with the exception of the item for the approximate valuation of the sugar sent at the beginning of 1885 to Australia, namely $282.16 c. which figure is replaced, at the date of September 1886 by $188.74 as being the net proceeds of the sugar sent to Australia.

It is to be remarked that the parties when referring to the sums due by the appellant to the respondent, in the preamble of the agreement of the 10th. September 1885, speak of the judgment given by the arbitrators for the sum of $400, whilst when they refer to the balance due for the previous account, they omit to say that a judgment had been taken on the 24th. June 1885 fo a fixed sum and they allude to that balance as being an undetermined one until the return accounts of the sugar sent to Austra. lia are received, and it is only in September 1886, that is to say, one year after the new agreement, that the net proceeds of those sugars are borne on the new account opened by the Respondents. We cannot help considering that the omission to speak of the judgment of the 24th. June 1885 was intentional, and our opinion is that the new agreement taken with the new account shows that parties had set aside the judgment of the 24th. June 1885. Coming to terms, they reopened the account current as if there had been no judgment at all.

It is certainly a principle of law that novation should not be presumed and that the will to operate it should clearly result from the acts of the interested parties, but, on the other hand, it is not necessary that it should be expressed in words, it may be implied, provided the intention of parties clearly appears from the context of the new agreement, and from the new facts which followed it. The best test in such matters is the incompatibility or inconsistency of the co-existence of the old contract with the new contract in presence of the new facts that have occurred. Now, in the present case we find, at first, a judgment debt for a fixed sum. Very soon after, a new agreement is entered into between parties, which refers to that debt as an undetermined one which can only be fixed after a certain event, and no reservation is made by the creditor as to the executory title which he had obtained with the consent of the debtor, and the agreement itself is followed by a new account in which one of the figures of the account, for which judgment had been taken, is altered. Can it be said that the judgment debt for a fixed sum which is the balance of the old account, has continued to co-exist with the new agreement and with the new account in which some of the figures are different?

We do not think so and we find that there has been here the substitution of a new contract in the place of the judgment debt. In the words of Basnage, quoted by Toullier Vol. 7 No. 278 "La novation est "suffisamment exprimée lorsqu'il paraît par "les termes du contrat que les parties on, "eu cette intention, comme lorsque le dernier "contrat ne pourrait subsister avec le pre- "mier et que la seconde convention subsistantt "il s'ensuit nécessairement que la première "demeure nulle et de nul effet."

We do not find in the English jurisprudence which is to be followed at Madagascar any thing contrary to the principles of the Civil Code in matters of novation; a judgment in England, as here, is a contract of record which may be set aside by the common consent of parties, provided their intention clearly results from their deed or from their acts.

We must, therefore, being of opinion that there has been novation in this case, hold that the seizure and sale of appellant's property at the request of respondents were wrongly made, and that they should be set aside as null and void—with costs.

With regard to the damages prayed for, we think that the case should be sent back to the Consular Court of Madagascar in order that they should be assessed.

JUDGMENT

Delivered by MR. JUSTICE ROUILLARD.

In this appeal from a judgment of the Consular Judge of Madagascar, three main points were submitted to the consideration of this Court. It was, in the first place contended that a judgment for $ 320.44 c. which was obtained by Respondents against appellant on the 24th. June 1885, in the Consular Court of Madagascar had been impliedly set aside and cancelled by a covenant between the same parties under date 10th. September 1885, and that the subsequent sale and seizure of appellant's property which were made in March 1887, by virtue of the judgment above referred to, were null and void entitling the appellant to $ 15,000 as damages.

In the second place, the appellant contended that there having been new commercial transactions between the parties, subsequently to the judgment of 24th. June 1885, the judgment had been satisfied by payments made to Respondents.

The third ground of appeal is that the procedure in ejectment which was followed by respondents was null and void, not having been made in conformity with the law of Mauritius.

In order that my decision on the first point raised by appellant should be fully understood, certain facts have to be clearly laid down. The respondents, who are traders and planters in Madagascar, had in 1884 and 1885 advanced money to appellant who cultivated canes on lands bordering on the factory of respondents. The appellant was under contract to have his canes crushed there and was entitled to a certain proportion of sugar out of his canes. The respondents had forwarded to Australia sugars accruing to appellant out of the crop 1884-85, and the proceeds of these sugars were to be applied towards the reimbursement of the advances made by respondents.

About the middle of 1885, differences arose between the parties and although the exact amount realized by the Sugars shipped to Australia was not yet known, the respondents brought before the Consular Court an action against appellant for $ 320.44 c. alleged to be due by appellant as a balance of account, In that balance of accounts, the net proceeds of the sugars sent to Australia were estimated at $ 282. 16 c., which was evidently an approximate figure ; appellant himself says so, (Page 3 of the Record). Judgment was given for the sum claimed, viz., $ 320.44 c. appellant appearing in Court to give his consent. Another action, brought at about the same date by respondents against appellant, in which damages were claimed for not having sent to respondents' mill, the quantity of canes stipulated by contract, was settled by arbitration, the sum awarded against appellant amounting to $ 400.

Some time after the judgment referred to, overtures were made by appellant to respondents, for an amiable settlement of his debts. In a letter annexed to the record, dated 4th. September 1886 (P. 2) appellant proposed that respondents should continue making advances to him and he goes into details to show his reasonable expectations of paying not only the new advances but his former debts. As a further inducement, he offers to make over to respondents a small property, " Eden ", seven or eight acres in extent, close to the estate of respondents. This letter was followed by an

agreement dated 11th. September 1885, (D) on which appellant's action is founded.

That document begins by reciting that the appellant is debtor of respondents for a sum of $400, the amount of the arbitrators' award. In a following paragraph (Par. 3), it is stated that the appellant owes to respondents a sum ranging from $300 to $400, and it is explained that the exact amount will not be known untill the account of the sugars sent to Australia is received by respondents. This paragraph runs as follows: "Que M. Maingard est aussi débiteur de "MM. Pélicier Frères d'une somme de "trois à quatre cents piastres (cette dette "ne pourra être établie d'une manière "exacte qu'à la réception des comptes de "retour d'une expédition de sucre faite "par MM. Pélicier Frères pour compte de "M. Maingard)". In the remainder of the document, the conditions of the further advances to be made by the Respondents and the mode of reimbursement are fully set forth. A paragraph is devoted to the transfer by appellant to respondents of the Estate "Eden".

The first ground of appeal turns entirely on the construction of paragraph 3. The appellant strongly urged that no reference having been made in the above paragraph to the judgment for $ 320.44, obtained by respondents, but only to the approximate amount of the appellant's debt which was to be finally determined by accounts expected from Australia, the conclusion must be drawn that the respondents fully renounced the judgment previously obtained in their favour.

No difficulty arises as to the principles which apply to the present case. Whether there has been in this case what in the French law is called "novation", namely the substitution of a new contract in lieu of a former one, or whether we are to consider the simple legal fact of a party who has obtained a judgment in his favour, impliedly giving up the manifest advantages which accrue to him from that judgment, it is certain that the intention of the parties must be clearly apparent i. e. apparent beyond doubt.

Can it be said that in this case the intention of Pélicier Frères was clearly apparent? Indeed, I cannot but be struck by the fact that if the intention of the parties had been that the judgment alluded to should be held null and void, nothing could have been more reasonable and natural than that their understanding on that subject should have been expressed in their agreement. That matter was too important to be passed over. Another question occurs to my mind. What benefit could have accrued to respondents in consequence of their waving the benefit of a judgment which gave them, as subsequent events have shown, a ready mode of execution against their debtor? Appellant, it is true, gave over to respondents his rights, whatever they may be, over eight or nine acres of land, but Pélicier by continuing to advance funds to appellant, was giving him that without which he would at once have succombed.

On looking more closely at Clause 3 under consideration, I think that its meaning can be explained by the following facts, which have been already referred to. On the 10th. September 1885, when covenant D was made, the result of the shipment of Maingard's sugars to Australia was not yet known. Three or four months before, the defendants, who as the correspondence shows, had in an angry mood brought an action against appellant, on a balance of accounts, could not do otherwise but fix approximately the amount to be realised by the sugars shipped to Australia; but, as time went on, the respondents might not unreasonably have feared that the deficit would be even greater. Cannot that phrase "M. Maingard est aussi "débiteur d'une somme de trois à quatre "cents piastres" have been introduced in order to enable Pélicier Frères, in the event

of the sugars sent to Australia realising less than the estimated amount, to claim the difference, over and above the sum fixed by judgment? That does not mean that the judgment would have been put aside *in toto*. As a further argument in support of appellant's contention, an account was produced (K) which was sent by Pélicier Frères to Maingard in September 1886, when their dealings were at an end. That document, which shows the debt of appellant to be $528.02 c. plus $400, the amount of the arbitrator's award, begins, on the debit side, in the same manner as the account on which the judgment for $320.44 was founded. But on the credit side instead of the item $282.16, the estimated proceeds of the sugars, the figure $188.79 which the sugars actually realised is found. This account must be construed in connexion with Clause 3 of the covenant under date 10th. September 1885 and is, I think, quite in harmony with it. If the object of Clause 3 was to enable Pélicier Frères to claim from appellant, over and above the judgment debt, any deficit which might result from the expected accounts from Australia, account K. showiug how and to what extent that deficit increased the indebtedness of appellant, becomes perfectly intelligible and cannot be construed as meaning, on the part of respondents, a waiver of the judgment previously obtained by them. In short, the Court is in presence of a party, who has obtained a judgment in a civil case, and in order that I should decide that the judgment has been impliedly set aside, the appellant's case should have been far more clear and conclusive than, after strict examination, I have found it to be.

SUPREME COURT

REFUSAL OF REGISTRAR TO TAX—NOTICE WITH SUMMONS—ORDINANCE 19 OF 1856—JUDGE AT CHAMBERS—JURISDICTION—WRIT OF EXECUTION—QUESTION OF LIABILITY—APPEAL FROM DECISION OF REGISTRAR — PRINCIPAL ACTION—NOTICE WITH SUMMONS INCOMPETENT.

A. paid a mortgage claim due to B. by C. and was subrogated into B's. rights.

When the real property was seized, A paid a bill of costs due to a notary for certain notarial obligations subscribed by C.

A, subsequently, called B before the Registrar in order to have the said bill of costs taxed, with the object of obtaining a writ of execution from the Judge in chambers.

B. made certain objections, inter alia, that the bill of costs was due not by him but by C.

The Registrar, thereupon, referred the parties to the competent Court.

A. then took a notice with summons calling upon B to show cause why the Registrar should not proceed with the taxation of the aforesaid bill of costs.

On the procedure being objected to as incompetent, A urged:

1o. *That under art*: 8 *of Ord*: 19 *of* 1856, *the Master (now, the Registrar) was the proper authority to tax such bills, and that the remedy of parties dissatisfied with the taxation was an appeal to the Supreme Court.*

2o. *That under art*: 10 *of the same Ordinance, notaries may obtain by way of application to a Judge at Chambers, a writ of execution to enforce payment of their costs duty taxed.*

3o. *That the defendant ought to have reserved his rights before the taxing officer and to have waited until he was called before the Judge in Chambers to raise his objections,*

as the Judge in Chambers had jurisdiction to decide upon these objections.

Held by the Court:

1o. *That art*: 10 *of Ordinance* 19 *of* 1856, *which speaks of the writ of execution to be issued by the Judge in Chambers, does not give the latter jurisdiction to try questions of liability which a person may raise when payment of bill of costs is claimed.*

2o. *That the meaning of the Ordinance is that, where there is a contestation as to the "quantum" of the costs, the Registrar will tax, and that the party dissatisfied may appeal to the Court.*

3o. *That, here, there should have been an appeal from the decision of the Registrar if the plaintiff was satisfied that that officer had jurisdiction to tax; or, that a regular action should have been raised before the competent Court.*

The application was dismissed with Costs.

—

JOSEPH,—Plaintiff.

and

DE ROSNAY,—Defendant.

—

Before

His Honor Sir EUGÈNE JULES LECLÉZIO, KT.—Chief Judge.

and

His Honor F. C. WILLIAMS,—Puisne Judge.

—

A. HUGUES,—Counsel for Plaintiff
G. BOULOUX,—Attorney for the same.

J. JOLLIVET.—Counsel for Defendant.

—

Record No. 24905.

18*th October* 1889.

This is a notice with summons calling upon the defendant to show cause why the Registrar, as taxing officer, should not proceed with the taxation of certain Bills of costs which were paid by plaintiff to Notary Kœnig for certain deeds which were drawn up by him, or by his predecessor, for some notarial obligations subscribed by Mr. & Mrs. Pignéguy in favor of the defendant.

It appears that the plaintiff was subrogated into the rights of the defendant in his mortgage upon the property of Mrs. Pignéguy and had it seized, and when the attribution of price began before the Master there was a production made by the Notary for his costs which had been taxed by the Chamber of Notaries.

The plaintiff, from what was said at the bar, believing that the Notary had a preferable claim to his own, paid the Notary's claim and, at the same, time the costs of production. We do not see in the record for what reason the plaintiff, after having paid the Notary, did not have his claim collocated in lieu and stead of the Notary's, but, after the attribution of price had been closed, it appears that he wanted his claim, the claim in which he was subrogated, to be paid by the defendant whose mortgage claim, he had reimbursed. He called him before the Registrar in order to have the Notary's bills taxed with the object of obtaining a writ of execution from the judge in Chambers. When the defendant appeared before the Registrar he made certain objections to the taxation. The objections which have been recorded by the Registrar are the following: "The defendent objects to the taxation of "this bill of costs: (1) because the Notary's "bill transferred to Urbain Joseph (the "Plaintiff) is due by Mr. and Mrs. Pignéguy "as evidenced by the bill itself (2), because "he is not indebted in the amount claimed "and (3) because the transfer by the Notary "to Urbain has never been notified to the "defendant."

The Registrar, after seeing those objections

and the answer to them said: " I refer " parties to the competent court."

Now, it is contended that the plaintiff ought not to have proceeded as he has done upon that decision of the Registrar. It is said that, if the Registrar was wrong, the plaintiff ought to have appealed from his decision and that the procedure which is before the Court is not an appeal, and, in the second place, that the wording of the Registrar means simply that he considered he had no jurisdiction to try the issues of fact which were raised before him and which involved the question of the liability of the defendant, and that the proper procedure was to enter a regular action before the competent Court. On the other hand, the plaintiff says that he has proceeded in virtue of Ordinance 19 of 1856.— Article 8 of which says that " in case of contestation " touching their fees and expenses, the " matter shall be referred to the Chambers " of Notaries for their advice, and then to " the Master of the Supreme Court who in " presence of parties or, in their absence, on " being duly summoned to appear, shall tax " the same; if any of the parties are dis- " satisfied with the taxation of the Master " they may appeal to the Supreme Court " who shall decide finally upon the matter." The Plaintiff relies also upon Article 10 of that Ordinance according to which "Nota- " ries may obtain by way of application to a " Judge at Chambers, a writ of execution to " to enforce payment of their fees and dis- " bursements, on their bills being as above " previously taxed. And the plaintiff adds " that the defendant ought purely and " simply to have reserved his rights before " the taxing officer and to have waited until " he was called before the Judge in " Chambers in order to raise his objections, " and that the Judge in Chambers had juris- " diction to decide upon those objections."

After examining this question, we are very clearly of opinion that the Judge in Chambers would have no jurisdiction to try issues of fact involving a question of the liability of a person who is called upon to pay a bill of costs due to a Notary. The Ordinance evidently means that where there is a contestation as to the *quantum*, the Master (now the Registrar) will tax, and if the party is not satisfied, he can appeal to the Court, and we are also of opinion that the article 10 of the Ordinance, which speaks of the Writ of execution to be issued by the Judge in Chambers, does not give this latter jurisdiction to try those questions of liability which a person may raise when he is asked to pay a bill of Costs.

We think, therefore, that the procedure which has been adopted in this case is not the proper procedure, that it is irregular, that, either, there should have been an appeal from the decison of the Registrar, as taxing officer, if the Plaintiff was not satisfied with his declaration that he had no jurisdiction to tax when a question of liability was raised, or that a regular action ought to have been raised before the competent Court.

We must therefore dismiss the application, with Costs.

SUPREME COURT

MEDICAL MEN — ACCOUNT — ARRÊTÉ 19TH. FRUCTIDOR AN XIII—HIGH FEES—GENERAL REPUTE—UNDERSTANDING BETWEEN MEDICAL MAN AND PATIENT — PATIENT'S STATION IN LIFE—CLAIM REDUCED—COSTS.

Plaintiff claimed Rs. 1,500 from the widow and universal legatee of a patient for professional care and attendance.

Defendant pleaded that Plaintiff's claim must be reduced, in conformity with a tariff promulgated by Arrêté of 19th. Fructidor an XIII, and further that the defendant's charges were unduly high.

By the Court:

1o. The Arrêté of the 19th. Fructidor, as already remarked, (Pellereau v. Motet) is hardly applicable to the present circumstances of the Colony.

2o. Besides, a medical man who would consider himself entitled by his skill or reputation to charge high fees for his visits or his surgical operations, is entitled to do so.

3o. But, in such a case, the medical man must show that either general repute as to the charges made by him, or else, some kind of understanding between him and his patients, entitles him to claim for his visits and operations higher fees than those charged by ordinary practitioners.

4o. That those conditions failing here, the Court had only to consider whether the fees claimed by Plaintiff were fair and reasonable, that is to say, were such that would be claimed by the generality of medical men under the same circumstances.

Taking into account the patient's station in life, the Court reduced the claim by one third.—No costs.

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DR. LAURENT,—Plaintiff.

and

WIDOW DAVRINCOURT & ANOR,—Defendants.

—

Before

His Honor ANDREW MURE,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

—

O. LAURENT,—Counsel for Plaintiff.
E. LAURENT.—Attorney for the same.

A. HUGUES,—Counsel for Defendants.
E. GANACHAUD,—Attorney for the same.

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Record No. 24,958.

5th. November 1889.

The Plaintiff is a medical men who claims from the Widow and the universal legatee of one Davrincourt the sum of $ 1520 for professional care and attendance during the last illness of the deceased.

The late Davrincourt, who was employed as a founder in one of the engineering establishments of the colony, had been ailing for a considerable time. Towards the end of the year 1888, he consulted the plaintiff in town. In February last, the plaintiff became permanently his medical adviser. In the month of March, by the advice of plaintiff, the late Davrincourt moved to Beau Bassin where he was several times visited by Plaintiff; but, finding himself worse, he returned to town. Soon after, however he took up a residence at Phœnix where he died on the 8th. May 1889.

Whilst at Phœnix, the late Davrincourt was constantly visited by Plaintiff, often twice per day. Several night visits were made by plaintiff. He also underwent three surgical operations. The first was for an abcess of the liver, the second operation was also to the liver. The third operation is described in plaintiff's account as "cautérisation au thermocautère de Paquelin". The charges in plaintiff's accounts are as follows :—

He claims two Rupees for the visits (fourteen in number) made by him in town. For each visit made at Beau Bassin and a consultation, he charges fifteen Rupees and twenty Rupees respectively. For the visits and consultations at Phœnix, plaintiff makes the same charges. For each "pansement" (dressing of a wound) and for his night visits, he charges Rs. 20. For the first operation performed by him, he claims Rs. 200 and for each of the two other operations Rs. 100; altogether his claim amounts to Rs. 1530. The defendants plead in the first plea that the

fourteen visits made to Plaintiff in town have been paid and that two visits are erroneously charged in the Account as having been made whilst Davrincourt was at Beau Bassin.

The next plea is to the effect that the plantiff's claim must be reduced in conformity with a tariff promulgated by arreté of 19 Fructidor year XIII, and in case the aforesaid tariff is held inapplicable by the Court, the Defendants contend that the Plaintiff's charges are unduly high.

They tender a sum of Rs. 612 in full satisfaction of Plaintiff's claim. It was proved and admitted that, previous to the action being brought, the widow DAvrincourt called on Plaintiff and expressed her readiness to pay him Rs. 1000, but that offer was refused by Plaintiff.

The Court has no difficulty in disposing of the first plea.

The Plaintiff proves his account from his book, whilst widow D'Avrincout, whose evidence was brought to disprove that of Plaintiff, relies on her memory alone. The Court does not believe that a Medical man in Plaintiff's position can be guilty of falsifying an account, and an error is hardly possible in the case of entries made regularly in a day book.

As for the tariff enacted by the arrêté of 19 Fructidor year XIII, the Supreme Court, in the case of Pellereau v. Motet has already remarked that it is hardly applicable to the present circumstances of the Colony.

The Medical commission which, in certain cases, is to determine the points in dispute between a Medical man and his patients no longer exists. The charge of five frames per visit, which is the sum fixed by the tariff, continues to be made in town, but as new Districts in the Colony have been opened up since the promulgation of the "arrêté" above referred to, and have become centres of dense population, it seems hardly fair to enforce on Medical practitioners, especially those residing in town, a tariff according to which they would be insufficiently recompensed for their trouble and exertions.

Leaving aside the question whether the "arrêté" of 19th. Fructidor year XIII applies or not, we are of opinion that in this Colony, as in more important centres, a medical man who would consider himself entitled by his skill or reputation to charge high fees for his visits or the surgical operations performed by him, is entitled to do so. But he must show that, either general repute as to the charges usually made by him, or else, some kind of understanding between him and his patients, entitles him to claim for his visits and operations higher fees than those charged by ordinary practitioners. Failing these conditions, the only question before a Court of Law is whether the fees claimed by any particular medical man are fair and reasonable, that is to say, are such that would be claimed by the generality of medical men under the same circumstances.

Here the Plaintiff does not profess to claim higher fees than any other medical man in good practice in this Colony.

There was evidently no agreement between Plaintiff and the late Davrincourt that special fees should be given to Plaintiff for professional attendance. The Court has, therefore, only to decide whether plaintiff's charges are fair and reasonable. The Court cannot approach this question without a feeling of regret that it is compelled to look into the items of the account of a medical man for his professional attendance, and to consider what that attendance is worth in a pecuniary point of view. The noble profession in which the Plaintiff occupies a distinguished position is not one where lucre is the main object, and, unless a medical man has to complain of bad faith on the part of his patient, it would be better for

the prestige of the medical profession that certain matters which are purely monetary should be kept out of public view.

The plaintiff has produced four medical men who stated that the plaintiff's charges, both for the surgical operations performed and for the visits made by him, were reasonable. The defendant has called three men in good practice at Curepipe and Rose Hill, whose evidence is in a contrary direction.

Dr. Drouin, who gave his professional help to plaintiff in the first operation performed by him, claimed only thirty rupees for his attendance on that occcasion. There may be some doubt whether five rupees or ten rupees would be the proper charge to a medical man coming from Curepipe to Allée Brillant near which Davrincourt had taken up his residence, but surely, it could not have been more than ten rupees as Davrincourt's residence was within three miles of Curepipe. Now, plaintiff who practises habitually both in town and at Curepipe, and has patients in localities along the Railway line, cannot claim fees as if he was residing in town. It is this fact which, in our opinion, was not fully realised by plaintiff's witnesses.

The Court think that the ordinary visits of plaintiff must be assessed at ten rupees and that, proceeding from that basis, some corresponding reduction must be made in the other items of plaintiff's account, with the exception perhaps of the charges for night visits; but that, the charges of plaintiff for the surgical operations performed by him on a man in Davrincourt's position might be equitably reduced by one half. It must be borne in mind that the late Davrincourt left property barely amounting to Rs. 15,000. This is no doubt a competency for a working man, but Davrincourt cannot be said to belong to the to the class of persons from whom, in certain circumstances, liberal rewards can be expected by professional men.

For the above reasons, we have come to the conclusion that the sum of Rs. 1,000 offered by widow Davrincourt to plaintiff was a fair and reasonable remuneration, and judgment will go for the plaintiff to that amount, but, as it is owing to the refusal of plaintiff that this action has been brought, there will be no order for costs.

SUPREME COURT

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APPEAL FROM DECISION OF DISTRICT COURT—JUDGE AT CHAMBERS—LEAVE TO APPEAL—ORD : 22 OF 1888—ART : 46 : PARA 2—SUMMONS TO SHOW CAUSE—OBJECTION REJECTED.

The Respondent to an appeal from a district Court's decision urged as a preliminary objection, that in this case leave to appeal should have been obtained from a Judge at Chambers, upon a summons calling him, the respondent, to show cause (Ordinance 22 of 1888, Article 46 para: 2.)

By the Court:

1o. *As a matter of expediency, a summons to show cause should issue in such cases.*

2o. *In this particular case, however, the Judge at Chambers having been satisfied that the party seeking to appeal was prejudiced for more than Rs.* 200 *and that the value of the subject-matter of the litigation exceeded Rs.* 1000; *his order not having been appealed from, and he not having even been asked to rescind that order, as he certainly, might have been asked to do, the objection cannot be sustained.*

—

PONDIT & ANOR,—Appellants.

and

SOOKUN,—Respondent.

—

Before

His Honor F. C. WILLIAMS.,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

F. MATHEWS,—Counsel for Appellants.
W. LEBLANC,—Attorney for the same.

J. JOLLIVET,—Counsel for Respondent.
H. THATCHER,—Attorney for the same.

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Record No. 932.

8*th. November* 1889.

JUDGMENT

Delivered by MR. JUSTICE WILLIAMS.

In this matter, which is an appeal from the District Court of Pamplemousses, the appeal is objected to in the following ground. The case was one in which the leave of the Judge in Chambers had to be obtained before the appeal could be made, under the 2nd section of article 46 of ordinance 22 of 1888. The leave of the Judge was sought. The application was an ex parte one, and it was argued before us, yesterday, by the learned counsel for the respondents that the procedure which had been followed was bad, that the procedure in cases of appeal from the district Courts where leave has to be attained, ought to be of a similar nature to the procedure in the cases of appeal to the Privy council from this Court. Now, in the case of an appeal to the Privy council from this Court, where the leave of the Court has to be asked and granted before the appeal can be made, it has been the invariable practice of the Court to call upon both parties to appear when the leave is asked, although the terms of the Order in Council do not say that the notice to show cause is required. It was argued before us that, similarly, in cases of appeal from the District Court to this Court, although Ordinance 22 of 1888 does not say that the party should be called on to show cause, the same procedure should be followed, and one argument for that course being followed, was that it would put a check on frivolous appeals. While it is true that a notice to show cause involves more in the way of costs to parties than a motion *Ex-Parte*, yet, I, for my own part, cannot adopt that argument, because to facilitate appeals is, of course, more or less, to promote litigation. It is to be observed also that the discretion of the judge in clause 2 of section 46 of the District Courts Ordinance has a double character. First of all, he must exercise a discretion with regard to prejudice to the extent of more than Rs. 200, and, secondly, a discretion as to the terms of section 6 of the Ordinance, for it would appear that leave to appeal can only be asked in cases where the Magistrate in the Court below has had to decide upon a right to or a contract concerning money or property, exceeding Rs.1060 in value. I stated yesterday and I say now, that my own view with regard to what the practice should be, as a matter of expediency, is in favour of a notice to show cause. But the view of the Court, in this particular case, is that the judge in Chambers having exercised his discration, having been satisfied that the party seeking to appeal was prejudiced for more than Rs. 200, and having been also satisfied, as we must take it that he was satisfied, upon the other point with regard to the value exceeding Rs.1000, and that order not having been in any way appealed from, the Judge in Chambers not even having been asked to rescind it, although he certainly might have been asked to rescind it, after the notice of appeal was served on the other side, we cannot now, at this stage of the proceedings,

take any other course than to consider the order as having been rightly made, and, therefore, in our view, the preliminary objection which is taken in this case, whatever it might in other cases be advisable for the Judge in Chambers to do, must fall to the ground, and the appeal will consequently be heard.

SUPREME COURT

—

GUARDIAN AD HOC—SALE OF LAND— REPRESENTATION OF MINOR—SUBSEQUENT LAWSUIT.

A guardian "ad hoc", appointed to represent a minor in a sale of land, has no capacity to represent the minor in a law suit, even if that suit has reference to certain illegalities or informalities arising out of the sale.

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MAGNIEN,—Plaintiff.

and

LETELLIER & ANOR,—Defendants.

Before

His Honor F. C. WILLIAMS,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

F. MATHEWS,—Counsel for Plaintiff.
F. SIMONET,—Attorney for the same.

O. LAURENT & E. VAUDAGNE, } Counsel for the Defendants.

E. LAURENT,—Attorney for the same.

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Record No. 24964.

15*th. November* 1889.

The plaintiff sues 1o. Joson, as the guardian "ad hoc" of the minor Pierre Magnien. 2o. Widow D'aubiguy, as mother and custodian of the said minor.

We think that both persons are wrongly sued. Joson Letellier was appointed guardian "ad hoc" of the minor Pierre Magnien in order to represent him in a sale of land about to be made, but he has no capacity to represent the minor in a lawsuit, not even if that suit has reference to certain illegalities or informalities arising (as alleged) out of the sale.

Widow D'Aubigny is neither the mother nor the guardian of Pierre Magnien.

These two persons must be put out of cause, with costs.

The declaration, after amendment, will have to be served on the newly appointed guardian of the minor Pierre Magnien.

SUPREME COURT

—

MALICIOUS PROSECUTION—FALSE IMPRISONMENT —ACTION IN DAMAGES—MALICE— PROBABLE AND REASONABLE CAUSE—FAUTE—MALVEILLANCE— NÉGLIGENCE— IMPRUDENCE — DISMISSAL—COSTS.

The plaintiff sued the defendant in damages for malicious prosecution and false imprisonment.

By the Court:

1o. *The plaintiff having been arrested by a warrant under the hand of a magistrate, there cannot be here any action for false imprisonment.*

2o. *With regard to the malicious prosecution, plaintiff would have had to establish, under the law of England, that there was malice combined with want of probable cause.*

3o. *Under the french law, he must establish a "faute" i. e. malveillance, négligence, or imprudence, etc., etc.*

4o. *The circumstances of the case fully show that there was here neither malice, want*

of reasonable and probable cause ; or, malveillance, négligence, or imprudence or any other " faute ".

Action dismissed, but without costs.

—

MONTY,—Plaintiff.

and

DUVERGÉ,—Defendant.

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Before

His Honor Sir E. J. Leclézio, Kt.,—Chief Judge.

His Honor F. C. Williams,—Puisne Judge.

and

His Honor J. Rouillard,—Puisne Judge.

—

W. Newton & O. Laurent,— Counsel for Plaintiff.

E. Pitchen,—Attorney for the same.

A. Thibaud, Acting Substitute Procureur General,—Appears for Defendant.

J. Guibert, " Crown Attorney ",—Attorney for the same.

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Record No. 24,606.

29*th. November* 1889.

The Plaintiff, lately a guard of Internal Revenue, claims Rs. 5,500 as damages from the Defendant, Superintendent of Inland Revenue, for the following alleged illegal acts.

The declaration recites that on the 7th. December 1888, the Defendant, unduly assuming the title and functions of an Inspector of Police, swore before a Magistrate in town an information charging the plaintiff with bribery ; that in consequence of the said information, a Warrant of arrest was issued by the Magistrate and the Plaintiff was kept in custody from the 7th. to the 9th. December, for a period of fifty hours. That the Defendant further prosecuted the Plaintiff for the alleged crime of bribery. That the Plaintiff was found guilty and, as a consequence of the sentence, was falsely imprisoned for 26 hours until he was able to find bail, pending an appeal which he had lodged against the sentence of the Magistrate.

That the conviction having been quashed on the ground that the Defendant had no right to prosecute, the Defendant again caused the Plaintiff to be prosecuted a second time for bribery, the result being that the Plaintiff was acquitted.

The plaintiff further alleges that, as a consequence of the illegal and false prosecution and conviction as alleged, he lost his position in the Government of Mauritius as Internal Revenue Guard and incurred great expense with reference to the prosecution instituted against him. The damages are founded on the great pecuniary loss and the moral prejudice suffered by Defendant.

The defendant, pleaded in substance, that he prosecuted in good faith, without malice, and that he had reasonable and probable cause for assuming the title and capacity of Inspector of Police, in addition to to that of Superintendent of the Internal Revenue Branch. In order that the case against the defendant should be fully understood, some further explanations are necessary. The defendant is a Superintendent of Internal Revenue, under the provisions of Ordinance 6 of 1878, which purports to consolidate the previous laws on licenses and the administration of the Inland Revenue.

In the 18th. Article of the aforesaid Ordinance, the functions of the officers and guards of Internal Revenue are defined. By the 19th. Section it is enacted that " in all " matters regulated by the laws mentioned

"in the last preceeding article, the Superin-
"tendent and Inspectors of Inland Revenue
"shall have all the powers conferred by the
"laws hitherto in force on Inspectors of
"Police, Inspectors of Distilleries and Ins-
"pectors of Licenses.

In the 24th. Section of Ordinance No. 6 of 1878, it is said that no officer or guard of Inland Revenue shall take or receive from any person any gratuity, fee or reward of any kind for the performance or omission of any act in the execution of his duty...any officer or guard contravening this provision shall be liable to dismissal from Office, without prejudice to any penalty to which he may be subject under the Penal Code.

Article 25 of the same Ordinance enacts penalties against officers and guards conniving at contraventions, without prejudice to any prosecution to which the offender may be liable under the Penal Code.

Defendant having, as the head of the Internal Revenue Branch, obtained information which led him to believe that the Plaintiff had been guilty of bribery, prosecuted him for that offence, under article 126 of the Penal Code of the Colony. In that information, he styled himself Superintendont of Internal Revenue and Inspector of Police. The plaintiff having been arrested under a warrant, he was tried, and we find in the Record of the proceedings before the Magistrate, that, in the Court below, an objection was taken to the capacity of Defendant to prosecute as Inspector of Police, and that it was overruled. The Magistrate further held the facts proved and sentenced the plaintiff to six months imprisonment. On appeal, the decision of the Magistrate was quashed on the ground that in terms of Ordinance No. 6 of 1878, the power of defendant to act as Inspector of Police was limited to prosecutions for offences under that Ordinance, and could not be extended to the prosecution of offences under the Penal Code. Subsequently to that judgment, the Plaintiff was again tried for the same facts on a prosecution regularly instituted by an Inspector of the Police force, but then was acquitted. Hence the present action.

The Plaintiff mainly rests his case on articles 1382 and 1383 of the Civil Code, which enact that "tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer." But, in the argument, the law which in England governs actions for malicious prosecutions and false imprisonment has been so often referred to, that the Court has been laid to examine how plaintiff's case would be dealt with under the English law.

In England, where the Ministère Public, as it is constituted in France, does not exist and where many prosecutions are instituted by private parties, actions for false imprisonment and malicious prosecutions are not rare.

The liability of defendants in such cases, has been cearly defined. On referring to the decisions of the English Courts, there cannot be any doubt that in cases like the present, where the plaintiff was arrested under a warrant signed by a District Magistrate, action cannot be brought for false arrest or an imprisonment but for malicious prosecution (see Brown v. Chapman 17 L.J.C.P. 329, West v. Smallwood 3 M. and W. 418, Austin v. Dowling 39 L.J.C. P. 260). The reason for that Rule is that in such cases the opinion and judgment of a judicial officer are interposed between the charge and imprisonment (per Willis J. in Austin v. Dowling, above referred to:)

In cases of malicious prosecution, the law renders parties liable when malice is combined with want of probable cause (per Tendal C. J. Williams v. Taylor; 6 Berigham 1867.)

It has, therefore, become our duty to con-

sider whether there have been in this case malice and want of probable cause.

On the first point, the Court has no doubt whatever. The Defendant was not actuated by malice when he instituted proceedings against the Plaintiff.

He had evidently been dissatisfied, for some time past, with plaintiff's conduct as a Revenue guard and had removed him from one district to another without any apparent good result. The prosecution was founded on a report by an Inspector of Inland Revenue and on an enquiry from which a strong " prima facie " case of bribery was made out against plaintiff. No better evidence that the prosecution was not rashly begun is that the Magistrate who tried the case in the first instance found the plaintiff guilty. It is true that, on the second trial, a different Magistrate, on the same evidence, found the plaintiff not guilty, but although the plaintiff is now fully entitled to assert his innocence of the charges brought against him, the defendant, when sued in damages, is justified in arguing that his prosecution was founded on facts so strong as to have convinced a Magistrate, in the first instance, to pronounce against Plaintiff.

Was there reasonable and probable cause?

Here again, as we think, the defendant makes out a strong case. Before the Ordinance 6 of 1878 was passed, the defendant had been sworn as special Inspector of Police under a letter from the assistant Colonial Secretary, dated 30th. October 1876, and the defendant seems to have been under the impression that his appointment still held good. The Court however, ruled that the defendant, having received under Ordinance 6 of 1878, a new appointment, the powers conferred on him as special Inspector under previous Inland Reuenue Ordinances had lapsed. As for the section of Ordinance No. 6 of 1878 which gives to the Superintendent of Inland Revenue the powers of Inspector of Police, it was not properly understood until the point was finally discussed in the Supreme Court on the appeal case already referred to, and it must be admitted that those various questions were not free from difficulty. The defendant for several years after the passing of Ordinance No. 6 of 1878, prosecuted members of his staff and other persons under the Penal Code of the Colony, for offences connected with the administration of his department. On two occasions, namely before the District Magistrate of Port Louis and the District Magistrate of Grand Port, his power to sue was challenged before a District Magistrate, but the point was decided in his favour. In the present instance, the defendant had, for the prosecution of plaintiff, received the authority of the Procureur General, Nay more, the Magistrate, before whom the proceedings took place in the first instance, on the point being taken, ruled that defendant had full power to prosecute as an Inspector of Police. The defendant is therefore amply justified in pleading reasonable and probable cause. He erred in his interpretation of the law, as subsequent events have shown, but under circumstances which entirely exonerate him of the charge of imprudence or negligence. It is clear that for the reasons above stated, he would be entitled under the English law to a verdict in his favour.

If we turn to the principles laid down in the French law, there must be, in order to entitle a party injured to claim damages, not only what the Civil Code terms " fait " but also a " faute " (Article 1382, Civil Code).

The principle was the same previous to the promulgation of the Civil Code.

Pothier, in his " Traité des obligations " No. 116, gives the following definition. " Le " quasi délit est le fait par lequel une per- " soune sans malignité mais par une impru- " dence qui n'est pas excusable, cause quel- " que tort à une autre."

In Demolombe commentaries, the same principle is laid down in the following words :

" Le fait seul, sans la faute, ne saurait être " une cause légale de responsabilité dans les " engagements qui se forment sans convention, " et partout ou nous rencontrerons la faute, " la négligence ou l'imprudence, nous devrons " reconnaître une cause légale de responsabilité civile." In other authors, we find the same principle established. The Court has, therefore, again to enquire whether in this case there has been négligence or imprudence on the part of defendant. On this point, the opinion of the Court has been previously expressed. We cannot hold that a public officer who has acted for several years in conformity to a certain interpretation of the laws concerning his department and of the powers conferred by them, which interpretation was not only acquiesced in by all parties concerned, but was upheld by the judicial authorities before whom, in the first instance, prosecutions instituted by that public officer had to be tried—can be held to have been imprudent or negligent in instituting against guard Monty the proceedings which have given rise to the present action, and, therefore, if the defendant has been the cause of injury to another person, which is very much to be deplored, it was through circumstances for which he cannot be held in law, responsible.

Our judgment will be for the defendant, but without costs.

SUPREME COURT

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ORAL EVIDENCE— ARTICLE 1348— FRAUDE— BONS LOST—DISTRICT COURT DECISION REVERSED.

A District Court held that "dol" or "fraud" had been established by a declaration made by a defendant, that when he paid his creditor (the plaintiff) the latter had not returned the title deeds establishing the claim, on the false pretence that they were lost — and admitted oral proof of such payment.

By the Court:

The defendant might have claimed a receipt when he paid, in the absence of his bons.— This is not one of the exceptions coming under Article 1348 *C. C.*

Judgment reversed, with costs.

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HEIRS DELORT, — Appellants.

and

BAILLACHE,—Respondent.

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Before

His Honor A. MURE,—Puisne Judge.

and

His Honor JOHN ROUILLARD,—Puisne Judge.

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F. MATHEWS,—Counsel for the Appellants.
A. ROHAN,—Attorney for the same.

A. HUGUES,—Counsel for the Respondent.
P. D. CHAPERON,—Attorney for the same.

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Record No. 934.

30*th. December* 1889.

The Appellants, who were plaintiffs in the District Court of Port-Louis, sued there the respondent for the sum of Rs. 641, the amount of 34 "bons" or vouchers subscribed by defendant during a period extending from the year 1875 to the year 1886.

The Court gathers from the record that the plaintiffs are the heirs and representatives of one Delort, who, for many years, was the treasurer and pay clerk of the Municipality. It appears that Delort was in the habit of making advances to the clerks of the Municipality, and amongst others, to defendant who is stated to have given "bons" for the sums so advanced.

According to defendant, the sums advanced to him by Delort in the course of any month were always deducted from his salary on his being paid in the first days of the following month.

The defendant pleaded payment, save for a sum of Rs. 186, and he accounts for the "bons", the subject matter of the present action, being in the hands of the plaintiffs, by the fact that Delort, either falsely alleged that the bons had been previously destroyed by him, or else, promised to destroy them hereafter.

On the defendant producing oral evidence to prove the payments made by him, and the circumstances above stated under which the payments were affected, the plaintiff in the Court below objected to the hearing of witnesses. They founded their objection on Art. 1845 of the Civil Code which runs as follows :

" Si, dans la même instance, une partie fait plusieurs demande dont il n'y ait point de titre par écrit et que, jointes ensemble, elles excèdent la somme de cent cinquante francs, la preuve par témoins n'en peut être admise ".

The defendant contended in reply that there had been in this matter " dol " and fraud on the part of Delort, who had falsely induced the defendant to forego the production and delivery of the " bons " or vouchers signed by him. The defendant urged in consequence that Art 1348 of the Civil Code found its application here.

The learned magistrate took this latter view and allowed oral evidence to be ushered in. His decision on this point forms the chief ground of appeal.

After due consideration, we cannot concur in the ruling of the Magistrate ; " dol " and fraud are truly causes for departing from the rule according to which oral evidence is excluded in all matters the value of which exceeds 150 francs. But this is when the direct and necessary result of the "dol" and fraud has been that written proof of a particular transaction has been dispensed with. In the present instance, this can hardly have been the case, in as much as the defendant on being told by Delort that a voucher written by him had been destroyed, ought, in the ordinary course of business, to have claimed a receipt or some other acknowledgment of the settlement made by him. Were it ruled otherwise, any debtor, sued on an obligatory writing of a value exceeding 150 francs, would be allowed, in direct violation of Arlicle 1341 of the Civil Code, to prove by witnesses payment of the same, on the simple allegation that his creditor, on receiving payment, either said that the document had been destroyed, or else, promised to destroy it.

The Court holds that the reasons put forward for admitting in this case oral evidence to prove the payment of the " bons" are insufficient. The case is remitted to the Court below to be proceeded with in conformity with the present judgment.

Costs of the appeal against respondent.

SUPREME COURT

ATTACHMENT—AFFIRMATIVE DECLARATION-GARNISHEE—ORDER OF JUDGE AT CHAMBERS—DISTRIBUTION—SUMMONS TO SHOW CAUSE—ORDER RESCINDED—COSTS.

An order having been obtained by the Respondent, a debtor, from a judge at Chambers, to the effect that certain garnishees should consign a certain sum of money and that the Master should distribute the same, the Court was asked, on a reference from chambers, to rescind the said order, because :

1o. The said order was premature, being taken before an affirmative delaration was lodged and served upon the opposite party.

2o. The said garnishees and the creditors, who attached the funds, ought to have had an opportunity of showing cause against the application.

Held by the Court:

1o. The Respondent ought to have allowed the affirmative declaration to be filed and a certain time to elapse before applying for the judicial distribution of the funds, in order that, in the meanwhile, the amount of the funds might be ascertained and that the creditors and the common debtor should endeavour to come to an amicable agreement about the distribution of the same.

2o. That in the particular circumstances of the case, respondent should have summoned the attaching creditors and the garnishees to appear to show cause against the application, the garnishees having a clear interest to ascertain that the vendor's privilege on the land they had purchased had been erased, and the attaching creditors being undoubtedly interested in the distribution of the sale price, part of which had been attached by them.

The Order of the Judge Chambers was rescinded; the applicant was allowed his costs; the other parties to bear their own costs.

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BAISSAC,—Plaintiff.

and

WIDOW CAMOIN & ORS,—Respondent.

—

Before

His Honor A. MURE,—Puisne Judge.

and

His Honor J. ROUILLARD,—Puisne Judge.

—

E. LECLÉZIO,—Counsel for Plaintiff.

H. LECLÉZIO,—Attorney for the same.

W. NEWTON, & Ors, — Counsel for the Respondent.

V. MARJOLIN,—Attorney for the same.

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Record No. 25925.

30*th. December*, 1889.

This is an application referred to the Court to obtain the rescinding of an order pronounced by the Judge in Chambers to consign a fund amounting to Rs. 2867.76, and appointing the Master to distribute that sum, being the balance of Rs. 4848.79 deposited by A. de Rochecouste & Co. with the applicant, and ordering the said applicant and the Receiver General to pay the said balance to the Master. Among the grounds stated for the rescinding of the order are two, the first of which maintains that the said order was premature-being taken before an affirmative declaration was lodged and served upon the opposite party; and, second, because Baissac and the creditors who had attached the fund and the garnishees ought to have had an opportunity of showing cause against the application; in other words that the "ex parte" application made by the Respondent, Mrs. Camoin, was wrongly made. The facts of the case are that the Respondent Mrs. Camoin was entitled to Rupees 287.66 which accrued to her out of the price of a certain property and was payable to her by the partnership A. de Rochecouste & Co. No fewer than five attachments were lodged against this sum in the hands of various parties, which, in the competition between them which followed, were all held good and valid by the Court. On the 22nd. February 1889, A. de Rochecouste & Co., were ordered to file in the Registry an affirmative declaration, on previous payment of costs; as the costs were not paid to them, the affirmative declaration, though dated 4th. March, was not filed until the 20th. August 1889.

Meanwhile on the 28th. March 1889, on the "ex-parte" application of the Respon-

dent, Widow Camoin, the order was pronounced appointing the Master to distribute the aforesaid balance.

Until the decree ordering Mr. Notary Baissac to consign the sum in the Master's hand was served on him, he never heard of this procedure adopted and carried out by the Respondent.

After an attachment has been lodged and and validated, the procedure contemplated by the Code of Procedure is that the garnishee makes what is called an affirmative declaration which must be, of course, filed in the Registry. In the event, of the creditors and common debtor not agreeing about the distribution of the fund which has been brought out in the affirmative declaration, the application may be made for an order upon the Master to distribute the fund. In the Code of Procedure some steps are directed to be taken which are not applicable in this Colony, in consequence of the duties of distribution having devolved upon the Master in place of a Judge commissioner, as under the Franch system.

We are of opinion that the procedure of the Respondent was premature; she ought to have allowed the affirmative declaration to be filed and a certain time to elapse before she proceeded to apply for the judicial distribution of the fund. It was the duty of the creditors and of the common debtor to endeavour to come to an amicable agreement about the distribution of the price, and the Respondent was not entitled, even though her intentions might be good, to precipitate matters, while the affimative declaration had not yet been filed and the exact amount of the fund could not be known.

We are further of opinion that, in the circumstances of this case, the Respondent was bouud to summon the attaching creditors and the garnishees to appear, if they thought fit to show cause against the application. The property was burdened with a vender's privilege and it was important for A. de Rochecouste & Co. to take steps to have it erased, before they were obliged to part with all control of the fund. Again the attaching creditors were undoubtedly interested in the distribution of the fund and having attached it ought, to have been called to the application.

For these reasons, we think the application now before us must be given effect to and we rescind the order pronounced by the judge in chambers dated 28th. March 1889 on the ex parte application of the Respondent Camoin, as prayed for. We cannot but express our regret that so much litigation has arisen about an insolvent fund, and in regard to the costs of this branch of the litigation, we find the Respondent Widow Camoin liable to the applicant Mr. Notary Baissac therein, but the other parties who appeared must bear their own costs.